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Third report on the expulsion of aliens

By Mr. Maurice Kamto, Special Rapporteur

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Part One
General Rules (continued)

III. General principles

1. In his second report on the expulsion of aliens (A/CN.4/573), after reviewing recent developments in both national and international practice (paras. 15-35), the Special Rapporteur attempted to define the scope of the topic (paras. 36-41). In Part One of the study on general rules for the expulsion of aliens (paras. 45-122), he focused on determining the main "scope" or even stumbling block of the debate within both the International Law Commission and the Sixth Committee of the General Assembly. He then tried to define more precisely than in his preliminary report (A/CN.4/554) the concepts relating to the topic. Taking into account the comments made by a number of members of the Commission during the consideration of the second report (A/CN.4/573), the Special Rapporteur has decided to use the terms "ressortissant" and "national" of a State as synonyms in this and subsequent reports.

2. This report focuses on the general principles of international law governing the expulsion of aliens. The debate over whether or not the expulsion of aliens relates to international law[1] is a thing of the past: the right of expulsion forms part of the principle of territorial sovereignty. A State's existence depends not only on the existence of a population which recognizes its sovereignty but also, especially, on the existence of a territory in which this sovereignty is exercised exclusively, de facto and de jure. As Rolin-Jaquemyns showed in his report on the right of expulsion of aliens, submitted to the Institute of International Law during its Lausanne session in 1888, this sovereignty would be compromised if it were possible for persons having no political ties to the receiving State — whose home country, in short, was elsewhere — to enter the territory, reside there and defy the local authorities, who would deem this stay to be dangerous or harmful to the country.[2] He drew the following conclusion:

> From the perspective of international law, any Government of a sovereign State, as a general rule if it deems necessary in its own interest, has the right to admit or not admit and to expel or not expel aliens who wish to enter or who reside in its territory as well as to impose conditions on their entry or residence if it deems it necessary in the interest of its tranquillity or domestic or international security, or of the health of its inhabitants.[3]

3. Such a view was in accordance with the prevailing doctrine of the period. Thus, for Darut, the notion of State sovereignty underpins the "rationale for the right of expulsion",[4] a right which had been universally recognized during that period.[5]

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[1] See especially the long discussion on this issue at the Institute of International Law, meeting of 8 September 1891, *Annuaire de l'Institut de droit international*, vol. XI (1889-1892), Hamburg session, pp. 273-320.

[2] Ibid., vol. X, 1888-1889, Lausanne session, p. 230.

[3] Ibid., p. 235.

[4] Joseph-André Darut, *L'expulsion des étrangers. Principe général — Application en France*, Thesis (Aix, 1902), pp.16 and 20.

[5] Alexis Martini, *L'expulsion des étrangers*, Thesis (Paris, 1909), p. 16.

4. Expulsion involves, on the one hand, the fundamental principle of State sovereignty in the international order, which gives the State the power to issue domestic regulations in accordance with its territorial jurisdiction, and, on the other, the fundamental principles underpinning the international legal order and basic human rights which all present-day States must respect. The preamble to the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 9 September 1892, thus postulates the following:

> Whereas for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence; whereas, however, humanity and justice oblige States to exercise this right while respecting, to the extent compatible with their own security, the rights and freedom of foreigners who wish to enter their territory or who are already in it; whereas from this international point of view it may be useful to draft in general and for the future some consistent principles, the acceptance of which would not in any case involve any assessment of actions carried out in the past ... .[6]

5. The following sections will therefore consider the linkage between the fact that, on the one hand, the right of expulsion is an established principle of international law and that, on the other hand, such a right must be exercised in accordance with the fundamental rules of international law. This involves building a structure that strikes a balance between the two notions by linking the right of the expelling State with the rights of the expelled person so that the State's sovereign right is exercised in a manner consistent with human dignity.

A. Right of expulsion

6. The right of expulsion provoked lively debate in the late nineteenth century, as the work of the Institute of International Law on the topic demonstrates in particular. Although the question of the foundation of the right to expel was not explicitly raised during this debate, it was nevertheless addressed directly or indirectly, since the assertion of such a right requires a reference to its legal basis in international law or, as appropriate, in domestic law. Such a permissive rule establishing the State's authority or freedom to remove an alien from its territory might at first glance appear to be drawn from general international law in the narrow, traditional sense, i.e., from customary law.

7. Analysis does not bear this out, however. The right to expel is not granted to the State by any external rule; it is a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory, which may be restricted under international law only by the State's voluntary commitments or specific *erga omnes* norms. What is involved in this case is only a restriction rather than a condition for the existence of the rule. In other words, the right to expel is a right inherent in the (territorial) sovereignty of the State; but it is not an absolute right, as it must be exercised within the limits established by international law.

[6] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, pp. 218-219.

1. An inherent right

8. The existence of a State's right to expel an alien from its territory is uncontested in international law,[7] and it does not appear to have ever raised serious doubt in the literature.[8] This is confirmed by State practice.[9] Moreover, it is enshrined in ample international arbitral case law, particularly in the late nineteenth and early twentieth century, as well as by more recent decisions and case law of human rights commissions and regional courts. Thus, in the *Boffolo* case, the umpire made the following statement: "That a general power to expel foreigners, at least for cause, exists in governments cannot be doubted".[10] The Belgian-Venezuelan Mixed Claims Commission reasoned along the same lines in the *Paquet* case, saying that the "right to expel foreigners from or prohibit their entry into the national territory is generally recognized".[11]

9. The decisions of human rights commissions and the case law of regional human rights courts also recognize the right of expulsion of aliens for the maintenance of public order as an established rule of international law (see A/CN.4/565, para. 190). In this regard, the European Court of Human Rights consistently refers in its case law to

> ... the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.[12]

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[7] See Giorgio Gaja, "Expulsion of Aliens: Some Old and New Issues in International Law", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. 3, 1999, p. 295.

[8] Several writers in the late nineteenth century, including Lord Coke, Sapey, Pinheiro-Ferreira, P. Fiore and Clovis Hugues, believed, in line with the idealistic humanism in vogue during that period, that nothing should encroach on human freedom, and they described the right of expulsion as a gross violation of imprescriptible human rights; see Darut, op. cit., pp. 8-9. Several writers, however, showed during the same period that such a concept was neither legally nor politically tenable (ibid., pp. 10 ff).

[9] In the aforementioned *Cursos* (see footnote 7), Gaja provides three interesting examples of such practice drawn from the *Digest of International Law*, edited by Whiteman (Washington, D.C., 1967), pp. 851, 854 and 861: United States Secretary of State Hull's reiteration in 1939 of his instructions to the Consulate General of the United States of America in France to the effect that the United States "recognised the right of a State to expel aliens considered dangerous to its security and would not intervene in such a case;" the statement made 10 years later by the British Minister of State, Hector McNeil, as follows: "[...] It is, of course, within the rights of the Hungarian Government to expel any foreigner from their country and there seems, therefore, to be no legal ground for an official protest;" a letter from United States Assistant Secretary of State Dutton addressed to a member of Congress in 1961 in which he writes, "[...] it may be pointed out that under generally accepted principles of international law a state may expel an alien whenever it wishes, provided it does not carry out the expulsion in an arbitrary manner [...]."

[10] *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. X, p. 531.

[11] *Paquet* case (Belgian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. IX, p. 325.

[12] *Moustaquim v. Belgium*, Judgment (Merits and Just Satisfaction), 18 February 1991, para. 43. See also *Vilvarajah and others v. United Kingdom*, Judgment (Merits), 30 October 1991, para. 102; *Chahal v. United Kingdom*, Judgment (Merits and Just Satisfaction), 15 November 1996, para. 73; *Ahmed v. Austria*, Judgment (Merits and Just Satisfaction), 17 December 1996, para. 38; *Boughamemi v. France*, Judgment (Merits), 24 April 1996, para. 41; *Bouchelkia v. France*, Judgment (Merits), 29 January 1997, para. 48; and *H. L. R. v. France*, Judgment (Merits), 29 April 1997, para. 33.

Indeed, it has always recognized the right of States,

> as a matter of well established international law, to control the entry, residence and expulsion of aliens.[13]

10. Considering the merits of the communication jointly submitted by four non-governmental organizations against Angola following the massive expulsions of nationals from various African States from that country in 1996, the African Commission on Human and Peoples' Rights referred to the right of expulsion as follows:

> The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide.[14]

11. Moreover, this universally recognized right[15] has been enshrined in the legislation of older countries.[16] One author noted at the beginning of the twentieth century that it had been incorporated into the legislation of most of the countries of Europe and the Americas and into many international treaties,[17] and there is no doubt, in the light of the current scale of migration, that this right is part of the legislation of all modern-day States.[18]

12. The right of expulsion exists, however, irrespective of any special provision in domestic or treaty law granting the right to the expelling State, as it derives from

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[13] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment (Merits and Just Satisfaction), 28 May 1985, para. 67.

[14] African Commission on Human and Peoples' Rights, Communication No. 159/96, Union interafricaine des droits de l'homme, Federation Internationale des ligues des droits de l'homme, Rencontre africaine des droits de l'homme, Organisation nationale des droits de l'homme au Sénégal Association malienne des droits de l'homme v. Angola.

[15] See Martini, op. cit., p. 16.

[16] In the United Kingdom, for example, prior to the Aliens Act of 11 August 1905, see in particular Craies, *Jurisclasseur de droit international privé*, 1889), p. 357 ff; in France the right of expulsion was granted in 1849 to the Government, but it was not new: the law of 28 ventôse, year VI, had already included it in its article 7, which stated: "Any alien travelling within the Republic or residing there without having a mission of neutral or friendly Powers recognized by the Government, or without having acquired citizenship, shall be placed under the special surveillance of the *Directoire executive*, which may withdraw their passports and require them to leave French territory, if it deems their presence might disturb the public order and peace;" see also, for example, the law of 21 April 1832, which gave the French Government the same right concerning foreign refugees. See in this respect, inter alia, Arthur Desjardins, "L'expulsion des étrangers" in *Questions sociales et politiques*, 1893, p. 107.

[17] See Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique", *Recueil des cours* (Collected Courses of The Hague Academy of International Law), vol. 18 (1927-III), p. 480, and the many examples of legislation from the period and international treaties which he cites on pp. 480-481.

[18] It would be tiresome to recapitulate here the relevant provisions of the legislation of every country in this respect. For European countries, a summary may be found in the following works: Bruno Nascimbene, ed., *Expulsion and Detention of Aliens in the European Union Countries* (Milan, Giuffrè, 2001); and Elspeth Guild and Paul Minderhoud, eds., *Security of Residence and Expulsion: Protection of Aliens in Europe*, Kluwer Law International (The Hague, 2001). For the United States of America, see in particular Louis B. Sohn and Thomas Buergenthal, eds., *The Movement of Persons across Borders, Studies in Transnational Legal Policy* (Washington, D.C., American Society of International Law, 1992), vol. 23. For a more general perspective, see Guy S. Goodwin-Gill, *International Law and Movement of Persons between States* (Oxford, Clarendon Press, 1978).

international law itself.[19] The Institute of International Law has thus stated, as noted earlier (see para. 4), that the right is a "logical and necessary consequence" of State sovereignty, of which it is an attribute, or of the State's independence. Around the same period, A. H. Marsh noted as self-evident that "[t]he right to exclude, being a mere incident of the sovereignty of each State over its territory is of course fully recognized by *international* law".[20] In the conclusion of an early 1940s study on the practice of excluding and expelling aliens in Latin America, another author stated: "There is nothing in the law of nations which forbids the expulsion of the 'domiciled' or 'resident' alien".[21] Concerning, in particular, the practice in Latin America, he wrote: "Latin American countries, exercising inherent powers of sovereignty, will, if there is a law, and if not, as a measure of high policy, exclude or expel aliens for reasons connected with the defence of the State, the social tranquillity, individual security, or the public order."[22]

13. This concept of the right to expel is set forth in several international arbitral awards. Thus, the sole arbitrator in the *Ben Tillet* case, Arthur Desjardins, wrote in section A of his award entitled "On the Right of Expulsion as a Matter of Principle":

> Whereas one may not contest the State's authority to ban from its territory aliens when it considers their activities or presence would compromise its security; whereas it also understands in the fullness of its sovereignty the implication of the facts underlying this ban ... .[23]

In the award rendered in 1903 in the *Maal* case, Plumley, the arbitrator, expressed more explicitly the idea that the right to expel is an inherent right. Reviewing the issue in relation to the exercise of this right by the Venezuelan Government, he wrote:

> There is no question in the mind of the umpire that the Government of Venezuela in a proper and lawful manner may exclude, or if need be, expel persons dangerous to the welfare of the country, and may exercise large discretionary powers in this regard. Countries differ in their methods and means by which these matters are accomplished, but the right is inherent in all sovereign powers and is one of the attributes of sovereignty, since it exercises it rightfully only in a proper defence of the country from some danger anticipated or actual.[24]

Similarly, the arbitration in the *Boffolo* case stated:

> The right to expel foreigners is fully held by every State and is deduced from its very sovereignty.[25]

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[19] See de Boeck, op. cit., p. 479.

[20] A. H. Marsh, "Colonial Expulsion of Aliens: An Answer", *American Law Review*, vol. 33, 1899, p. 90 (author's emphasis).

[21] J. Irizarry y Puente, "Exclusion and Expulsion of Aliens in Latin America", *American Journal of International Law*, vol. 36, 1942, p. 270.

[22] Ibid.

[23] Award of 21 August 1896, reproduced in the *Revue générale de droit international public*, 1989, p. 48.

[24] *Maal* case (Netherlands-Venezuelan Mixed Claims Commission, 1 June 1903, in *Ralston's Venezuelan Arbitrations of 1903* (Washington, D.C. 1904), pp. 914-915; see also *United Nations Reports of International Arbitral Awards*, vol. X, p. 731.

[25] *Boffolo* case (Italian-Venezuelan Mixed Claims Commission, 1903), *United Nations Reports of International Arbitral Awards*, vol. X, p. 528.

14. The question as it was raised in the late nineteenth century was whether it was possible to substitute precise rules on expulsion for the arbitrary ones which prevailed in many States.[26] From the perspective of contemporary international law, it seems that the right to expel, although it is a sovereign right of the State, is not conceived as an absolute right which confers discretionary power on the expelling State.

2. A non-absolute right

(a) Factual background

15. The right of expulsion has sometimes been considered an absolute right. This view arose particularly in the nineteenth century at the time when the debate on the right of expulsion as a right of the State based on international law began. In its 1893 decision, the Supreme Court of the United States of America considered "[t]he right of a nation to expel or deport foreigners" "as absolute and unqualified as the right to prohibit and prevent their entrance into the country", "being an inherent and inalienable right".[27] This position reflected, consciously or unconsciously, the traditional theory that the power of expulsion, a logical and necessary consequence of sovereignty, is absolutely discretionary and is not subject to any limits or controls.[28] The intense debate about the power of the State to expel aliens arose precisely because this absolutist understanding of the right of expulsion was such that it placed those subject to expulsion at the mercy of Governments.

16. This debate is now in the past, since the traditional view has been completely abandoned. Moreover, international practice overtook the literature on this point, and it has now been clearly acknowledged for almost two centuries "that the freedom to expel is not absolute, that it is subject to limits [...]".[29] In fact, from the time of its first work on the expulsion of aliens, the Institute of International Law has stated that the exercise of the right of expulsion is subject to certain restrictions, including the principle that "expulsion must be carried out with full consideration, in accordance with the requirements of humanity and respect for acquired rights".[30] On this point, it shared the views of Féraud-Giraud who, in his paper on the subject, stated that, in exercising its right of expulsion, a State must always, as far as possible, try to reconcile its duty to maintain order in its territory and to safeguard its own internal and external security with the need "to respect the laws of humanity, the human rights of every individual and the principle of freedom of relations between nations".[31] In the same vein, the Institute's rapporteur on the subject, von Bar, while recognizing that the sovereign right of States was unquestionable in that regard, nonetheless expressed the view, "no matter how far this sovereign right extends, it may not extend to abolishing all the individual rights of aliens".[32]

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[26] See extract of minutes of the meetings of the Institute of International Law, held on 8-9 September 1892 and chaired by Albéric Rolin, Vice-President, *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 185.

[27] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), pp. 707, 711 and 713.

[28] See de Boeck, op. cit., p. 472.

[29] Ibid., p. 473.

[30] *Annuaire de l'Institut de droit international*, vol. X, 1888-1889, Lausanne session, p. 236.

[31] Ibid., vol. XI, 1889-1892, Hamburg session, p. 276.

[32] Ibid., p. 316.

17. The danger of affirming that the right of expulsion was absolute and discretionary was well understood, but the legal response was not well articulated. Although the area of human rights is not the only one affected, both the literature and case law suggest that the right of expulsion is limited only by considerations of humanity and is therefore limited to the rights of the individual and his or her property rights. It is true that, by invoking the human rights of every individual and the principle of freedom of relations between nations (see preceding paragraph), the Institute of International Law seemed, in 1891, to be hinting at something new — but what? The early literature is not precise. Admittedly, it sets aside the theory adopted in the Middle Ages according to which State sovereignty was absolute and ownership of the territory was attributed to the State. However, in place of that theory, it proposes the rather vague idea that "it does not follow that the rights of aliens are at the mercy of the State's whim".[33]

18. In order to determine the scope of the rule establishing the power or authority to expel, the following question should be asked: what limits should be imposed on the right of expulsion? The answer to this key question has two distinct components. The first is linked to the very nature of the international legal order, which requires that every rule or principle of international law be compatible with the underlying tenets of that legal order; these are constraints that are intrinsic to or inherent in the legal order itself. The second component relates to the principles which must be respected when the right of expulsion is exercised; they constitute a set of rules derived from, or essentially produced by, the legal order in the form of objective and general rules or in the form of rules created by the subjects of international law. This second category of limits will be dealt with separately under subheading B of this section.

(b) Limits inherent in the international legal order

19. Since international law applies to equal, sovereign entities "with the same claims to the exercise of absolute sovereignty", it constitutes a vital means of regulating the coexistence of these sovereign entities while also being the necessary corollary thereof.[34] In fact, in modern international law, State sovereignty cannot be understood in the absolute sense; it means only that no State is subordinate to any other State, but that each must respect the minimum rules that guarantee, on the one hand, the same privileges to all other States and, on the other hand, the very survival of the legal order. In this regard, State sovereignty is limited by a number of underlying tenets that are inherent in the legal order and without respect for which the very existence of international law would be compromised and the international community doomed to total anarchy.

20. The discretionary power of expulsion is limited by the general principles governing State actions in the international order. In fact, as a right inherent in State sovereignty, the right of expulsion is naturally subject to these limits, a set of underlying tenets that form the basis of the international legal system. These limits exist independently of other constraints relating to special areas of international law such as international human rights law, international refugee law and the law on migrant workers. They are inherent in the international legal order in the same way

[33] Darut, op. cit, p. 19.

[34] See, inter alia, Patrick Dailler, Nguyen Quoc Dinh and Alain Pellet, *Droit international public*, 7th ed. (Paris, Librairie générale de droit et de jurisprudence, 2002, p. 83.

as the right of expulsion is inherent in sovereignty. Since the sovereign right of expulsion is not, therefore, an absolute right, its validity is determined in the light of the State's obligations, whether they derive from custom, treaty, or general principles of law.[35] As has been noted, the term "discretionary", which qualifies the power of the State with regard to expulsion, is generally coupled with the idea that such a power is not "arbitrary" and, consequently, that the State should not abuse the discretion accorded to it in such matters. "The rules thus define both the powers of a State and the limits of its authority, and provide protection to an individual against the abuse of authority."[36]

21. The Special Rapporteur believes, however, that the limits inherent in the international legal order, in so far as they make that legal order possible, should be distinguished from the limits arising from specific areas of international law which form part of the conditions for the exercise of the right of expulsion.

22. The intrinsic principles that qualify the right of expulsion are *pacta sunt servanda*, good faith and the requirement of respect for jus cogens, which implies a principle of non-conflict between a given rule of international law and a peremptory norm. These are the principles on the basis of which the right of expulsion is said to be unquestionable, without, however, being an absolute rule; they are the reverse side of the rule. The principles are well known and do not require particular elaboration in the context of this report.

23. In the light of the points set out above, draft article 3 should read as follows:

Draft article 3
Right of expulsion

1. A State has the right to expel an alien from its territory.

2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.

B. A right to be exercised subject to respect for the fundamental rules of international law

24. The principles which are intrinsic to and inherent in the international legal order and which represent the other side of the coin of the right of expulsion must be distinguished from the principles governing the exercise of the right of expulsion. The latter principles are external to the international legal order and determine the relevant legal regime. The well-known distinction made by Herbert Hart between "primary rules" and "secondary rules" could usefully be applied in this instance. While the right of expulsion and its intrinsic limits constitute primary rules, the principles that form the basis for the exercise of that right constitute secondary

[35] Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford, Clarendon Press, 1978), p. 21; see also B. O. Iluyomade, "The scope and content of a complaint of abuse of right in international law", *Harvard International Law Journal*, vol. 16, No. 1 (1975), pp. 82-83; and A/CN.4/565, paras. 198-200.

[36] Louis B. Sohn and Thomas Buergenthal, eds., op. cit., pp. IX-X; and A/CN.4/565, paras. 201-239.

rules; for that reason, they are part of the relevant codification work of the International Law Commission.

25. The rules of international law governing the right of a State to expel aliens include both the substantive rules and the procedural rules which must be observed if the expulsion is to be lawful. As one author has written:

> In all these respects the power of expulsion is typical of the competences possessed by States with respect to the entry and residence of aliens. Formerly characterised as aspects of the State's absolute discretion, these powers are regulated and controlled, both as to their substance and as to their form, by a system of rules now sufficiently advanced and cohesive to be described as the international law of migration.[37]

26. Some of these rules are of domestic origin but acquire the status of norms of international law, either as "general principles of law recognized by civilized nations", or as norms generated by State practice which are the subject of a court ruling.

27. The study of treaty practice and case law, both national and international, in particular that of regional human rights courts, reveals the following general principles, which are widely recognized as applicable to the expulsion of aliens: the principle of non-expulsion of nationals, the principle of non-expulsion of refugees, the principle of non-expulsion of stateless persons, the principle of prohibition of collective expulsion, the principle of non-discrimination, the principle of respect for the fundamental rights of the expelled person, the principle of prohibition of arbitrary expulsion, the duty to inform and the duty of the expelling State to respect its own law (*patere legem quam fecisti*) and the procedure prescribed by the law in force. Taking these three principles together, three distinct categories of limits emerge: limits relating to the person to be expelled (*ratione personae*), limits relating to the fundamental rights of the person to be expelled (*ratione materiae*) and limits relating to the procedure to be followed with regard to expulsion (*ratione prosequi*).

1. Limits relating to the person to be expelled

(a) Principle of non-expulsion of nationals

28. The term "national of a State" means a person who is connected with the State in question by a link of nationality. Such a person has a current right of nationality of that State: he or she has the nationality of the State in question, which is therefore his or her national State or State of nationality. In that sense, the term "national" is contrasted with the term "alien", which, as indicated in the Special Rapporteur's second report (A/CN.4/573, para. 194), means "a *ressortissant* of a State other than the territorial or expelling State" in the present context.

29. As indicated in his second report (A/CN.4/573, paras. 128-129), the Special Rapporteur continues to believe that it is prudent not to embark on a study of the question of nationality, not only because the conditions for access to nationality are strictly a matter for the legislation of each State, but also because nationality is a restrictive and inadequate criterion against which to define the concept "alien".

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[37] Richard Plender, *International Migration Law*, revised 2nd ed. (Dordrecht, Martinus Nijihoff, 1988), p. 477.

30. Nonetheless, determination of a person's nationality is a question of international law. This is particularly true when the laws of two or more States attribute different nationalities to the same person. In the *Arata* case, Uríbarri, who was the arbitrator pursuant to the Italian-Peruvian agreement of 25 November 1899, stated in this regard: "Doubtless, when the laws of two States each attribute a different nationality to the same person, the courts of each State apply the laws of that State; however, if the question is brought before an arbitral tribunal, that tribunal rules in accordance with the principles of international law."[38]

31. This is what the arbitral tribunal presided over by Louis Renault did in the *Canevaro* case. The case related to Count Raffaele Canevaro, who was a native of Peru but was of Italian descent; at the time of his birth he was Peruvian under Peruvian law *jure soli* and Italian under Italian law *jure sanguinis*. The arbitral tribunal constituted under the Italian-Peruvian agreement of 25 April 1910 was called upon to decide whether Canevaro was entitled to be considered an "Italian claimant". The tribunal, while stating its equal respect for the laws of the two States in question, sought evidence of Canevaro's affiliation with one of the two States. It expressed its preference for what the literature called "*active nationality, de facto and de jure* nationality, the nationality for which the person in question has expressed a clear and consistent preference".[39] The arbitral tribunal found that Raffaele Canevaro had in fact repeatedly acted as a Peruvian citizen by running for the Senate, to which only Peruvian citizens are admitted and before which he had presented himself to defend his choice of nationality, and in particular by accepting the position of Consul General for the Netherlands after requesting authorization from the Peruvian Government and, subsequently, Congress.

> Consequently, the Permanent Court of Arbitration in the Hague found that, in such circumstances, whatever the status of Raffaele Canevaro might be with regard to Italian nationality, the Government of Peru was entitled to consider him a Peruvian citizen and to deny him the status of Italian claimant.[40]

32. Based on arbitral case law and literature, this solution, as is well known, served as a model for the Permanent Court of International Justice,[41] and more specifically for the case law of the International Court of Justice, notably in the *Nottebohm* case.[42]

33. Therefore, it is not for international law to establish conditions of access to nationality — a matter which falls wholly within the competence of the State — but to settle problems relating to conflict of nationality on the basis of criteria specific to international law. These criteria make it possible to determine under international law whether a person has the nationality he or she claims to have, or, on the other

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[38] Verdict of 30 September 1901, in Baron Descamps and Louis Renault, *Recueil international des traités du XX^e siècle* (Paris, Rousseau), vol. I, p. 709.

[39] De Boeck, op. cit., p. 459 (author's emphasis) and "La sentence arbitrale dans l'affaire *Canevaro*, 3 mai 1912", *Revue générale de droit international public*, 1913, vol. XX, pp. 348-349.

[40] Ibid.

[41] See, in particular, Permanent Court of International Justice, *Nationality Decrees Issued in Tunis and Morocco*, advisory opinion of 7 February 1923, *I.C.J. Reports* 1923, series B, No. 4.

[42] *Nottebohm* (*Liechtenstein v. Guatemala*) case, Judgment of 6 April 1955, *I.C.J. Reports 1955*, p. 4.

hand, whether a State which claims that a person is not a national of that State is in fact that person's State of nationality.

(i) The principle

34. Since international law can thus determine a person's nationality in the event of a conflict, it establishes conditions for the application of the prohibition of expulsion by a State of its own nationals. The question is whether a rule exists in this regard in international law. The memorandum by the Secretariat provides a synthesis of the relevant elements of an answer to this question:

> Although international law does not appear to prohibit the expulsion of nationals in general, the ability of a State to take such action may be limited by international human rights law. First, some human rights treaties expressly prohibit the expulsion of a person from the territory of the State of which he or she is a national. Secondly, the right of a national to reside or remain in his or her own country may implicitly limit the expulsion of nationals. Thirdly, the duty of other States to receive individuals is limited to their own nationals. Thus, the expulsion of nationals can only be carried out with the consent of a receiving State. The limitation on the expulsion of nationals may extend to aliens who have acquired a status similar to nationals under the national law of the territorial State. Fourthly, the national law of a number of States prohibits the expulsion of nationals (footnotes omitted).[43]

35. With regard to international human rights instruments, it is worth mentioning in particular the American Convention on Human Rights, article 22, paragraph 5, which provides as follows:

> No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

The Inter-American Commission on Human Rights found a violation of this provision in the case of the expulsion of a number of Haitians from the Dominican Republic: the persons in question, sugar-cane cutters, were rounded up and expelled in an indiscriminate manner, even though they included several individuals born in the Dominican Republic who therefore had the nationality of that country.[44]

36. With regard to the rights of nationals, it is worth noting that, in addition to the numerous examples of national laws that prohibit the expulsion of nationals cited in the memorandum by the Secretariat (A/CN.4/565, para. 36, footnote 60), French law, for example, has long affirmed the principle of the prohibition of the expulsion of French nationals from France. It has been accepted that an expulsion order issued by a prefect against a French national is not binding upon the latter. This principle, based on a person's having the status of French national, has been examined in many judgements and decisions: when a person claims to be a French national, the

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[43] A/CN.4/565, para. 36, and the comprehensive footnotes provided on the same pages, in particular the list of provisions of international human rights conventions expressly prohibiting the expulsion by a State of its own nationals: article 22, paragraph 5, of the American Convention on Human Rights of 22 November 1969 and article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights.

[44] See progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere (sect. II (a), para. 9), in *Annual Report of the Inter-American Commission on Human Rights 1999*, OEA/Ser.L/V/II.106 doc. 6 rev., 13 April 2000, chap. VI.

onus is on the Public Prosecutor's Office to prove that the person is an alien.[45] At the beginning of the twentieth century, Martini wrote:

> Needless to say, aliens who have become naturalized French citizens may not be expelled, and, conversely, French nationals who have lost their French nationality may be expelled from France.[46]

37. This opinion drew on a decision of the Court of Chambéry of 21 May 1908 in the *Solari* case amending a decision of the Saint-Julien Correctional Court of 30 January 1908. The case involved a French citizen who had deserted from the French army before the end of his seven-year voluntary tour of duty. He had left France to reside in Geneva, where he became a naturalized Swiss citizen on 8 February 1861. He then returned to France, where he claimed that he had never lost his French nationality as a result of his naturalization because, as at 8 February 1861, his second tour of duty —from which he had deserted — was still ongoing. He claimed that the French Government itself had come to the same conclusion, since, at the time of the amnesty of 14 August 1869, the French Consul General in Switzerland had expressly granted him the status of French national by authorizing him "to return home" and stating that he could not be prosecuted for desertion. The Court accepted that argument

> and said that, since Solari had retained French nationality, the expulsion order issued against him was invalid.[47]

Continuing his consideration of the question of persons who may be expelled, Martini wrote:

> Only French nationals may not in fact be expelled. They have a right to remain in France, of which right they may be deprived only by a sentence of banishment.[48]

38. Similarly, but on the basis of the reverse reasoning, one author noted at the beginning of the twentieth century that an individual born on French soil to unknown parents who returns to France and thereby infringes an expulsion order previously issued against him or her, may not be convicted in a criminal court if he or she claims to be a French national, unless evidence is produced that he or she is an alien.[49] The author concluded his analysis as follows:

> Consequently, if we accept the principle set out by the Institute of International Law, i.e. that the State has the right to expel only those who do not have a current right of nationality, we must conclude that an individual who, by law, has the capacity to acquire French nationality ceases to be treated as an alien as soon as he or she applies for that status in accordance with the

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[45] See Nice Civil Court, 6 January 1893, *Dalloz périodique*, 1893, 3, p. 245, and the note by Dupuis; Court of Cassation, 28 May, *Journal du droit international (Clunet)*, 1904, p. 689; Paris Civil Court, 30 June 1905, ibid., 1907, p. 730; see also Darut, op. cit., p. 207; Martini, op. cit., pp. 155-156; and de Boeck, op. cit., p. 590.

[46] Martini, op. cit., p. 26.

[47] Decision reproduced by Martini, op. cit., pp. 27-28.

[48] Ibid., p. 30; and, along the same lines, see in particular René Garraud, *Traité théorique et pratique du droit pénal français*, vol. 1, 2nd ed. (Paris, Larose et Forcel, 1898-1902), No. 178, p. 333; Larcher, note under Algiers, 3 December 1903, *Revue algérienne*, 1906, 2, p. 17.

[49] See Darut, op. cit., p. 75.

law, that is as soon as that person's right to apply for French nationality is no longer a potential right but has been exercised.[50]

39. Given the abundant national and international practice mentioned above and doctrinal opinion on the subject, which is long-standing and nearly unanimous, there is cause to be — at the very least — cautious about the statement that "a general rule of customary international law forbidding the expulsion of nationals does not exist".[51] In fact, the *principle* of the prohibition of expulsion by a State of its own nationals is indisputable in international law, even though, like most principles, there are certain exceptions to it, as we shall see below. Whether it takes the form of a customary rule or a general tenet of law, the principle exists in international law. This seems to have been the view of the Institute of International Law when it considered the "right to admit and expel aliens", as shown in particular by its work on the subject at its Geneva session in 1892. Article 2 of its International Rules on the Admission and Expulsion of Aliens, adopted at that session, provides as follows:

> In principle, a State may not prohibit either its nationals or persons who are no longer nationals of that State but have not acquired the nationality of any other State from entering or remaining in its territory.[52]

40. The expression "in principle" at the beginning of this article had been suggested by Desjardins in response to the concern expressed by Pradier-Fodéré, who found the wording proposed by von Bar, reproduced below, "a little ambitious":[53]

> International law is contrary to any act which prohibits nationals from entering or remaining in the territory of the State to which they belong. The same applies to persons who are no longer nationals of that State but have not acquired the nationality of any other State.[54]

41. The wording was somewhat abrupt. It was very difficult indeed to state categorically that international law was "contrary to" something. This same problem was apparent in the case of the right to expel. The formulation was valid for the prohibition of expulsion, including the expulsion of nationals. By that time, however, the laws of some States had extended the principle of non-expulsion by a State of its nationals to certain categories of individuals who were clearly designated as aliens or non-aliens. Thus, according to article 2 *in fine* of the Belgian law of 12 February 1897 — referring to article 9 of the Belgian Civil Code, which was conceived in the same terms as article 9 of the French Civil Code — the following persons could not be expelled:

1. An alien authorized to establish his domicile in the Kingdom;

2. An alien married to a Belgian woman with whom he has had one or more children born in Belgium during his residence in the country;

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[50] Ibid., p. 94.

[51] Karl Doehring, "Aliens, Expulsion and Deportation", in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, 1990, vol. I (Amsterdam, Elsevier Science Publishers, 1992), p. 110.

[52] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 219.

[53] Ibid., p. 188.

[54] Ibid., p. 187.

3. An alien who is married to a Belgian woman and who has resided in Belgium for more than five years and continues to reside there permanently;

4. An individual, born in Belgium of foreign parentage, who has resided there for the time period stipulated in article 9 of the Civil Code.[55]

42. Likewise, the law of Luxembourg of 30 December 1893 provided that a child who has the option to choose his nationality "cannot be expelled before the expiry of the allowable time period".[56] The law of the Netherlands at that time also provided that "an alien who, having established residency in the country, has married a Netherlander and has had children born in the Kingdom, may not be expelled".[57] The Brazilian law of 7 January 1907 "on the expulsion of aliens from the national territory" declared that "an alien cannot be expelled if he has resided in the territory of the Republic for two continuous years, or even less time if he is also: (a) married to a Brazilian, or (b) widowed with a Brazilian child".[58] These provisions of article 3 of the law were expressly applied in two judgements, that of the Federal High Court of 30 January 1907 and that of the Federal Court of Appeals of 11 February 1907.[59] In Venezuela, under article 6 of the law of 16 April 1903, not only were "domiciled aliens" and "temporary aliens" not subject to expulsion, but they lost their status as aliens and were, ipso facto, "subject to the same responsibilities, duties and obligations as nationals in respect of potential political risks".[60] More recent examples include the current Italian law stipulating that the following categories of aliens cannot be expelled from the national territory, their status being assimilated to that of Italian nationals: minors, with few exceptions; pregnant women; persecuted persons; refugees and asylum-seekers; aliens living with relatives up to the fourth degree; and holders of residence permits.[61] It could be concluded from these laws that certain States do not permit the expulsion of aliens who have been granted citizenship status by law, such as aliens who, having been born in the country of foreign parents, have been legally naturalized.[62]

43. The principle of non-expulsion of nationals should thus be understood broadly as applying to "*ressortissants*" of a State as defined by the Special Rapporteur in his second report (A/CN.4/573), i.e., not only to persons who, like nationals, have the nationality of a State, but also to certain "aliens" who have a similar status to that of nationals under the laws of the receiving State or who have ties with that State. The Human Rights Committee expressed a similar view in the *Stewart v. Canada* case.[63] In his analysis of this case, Gaja writes:

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[55] See the text of this law in *Annuaire de législations étrangers*, vol. 27, 1898, p. 514.

[56] See the text of this law in Ruppert, *Code pénal et Code d'instruction criminelle suivis des lois spéciales et règlements particuliers en matière répressive en vigueur dans le Grand-Duché de Luxembourg* (Luxembourg, Buck, 1900), p. 467.

[57] See Jitta, "Le droit d'expulsion des étrangers dans la législation des Pays-Bas", *Journal du droit international privé*, 1902, p. 69.

[58] See the text of this law in *Journal du droit international privé*, 1907, pp. 1217 ff.; and in *Revue du droit international privé*, 1908, pp. 855 ff.

[59] Judgements reported in *Revue de droit international privé*, 1908, pp. 822 ff.

[60] See the text of this law in *Annuaire de législations étrangères*, 1903, pp. 739 ff.

[61] See Paolo Bonetti, "Italy", in Bruno Nascimbene, ed., op. cit., p. 339.

[62] Martini, op. cit., p. 49.

[63] See *Official Documents of the General Assembly, Fifty-second Session, Supplement No. 40* (A/52/40), vol. II, annex VI.G, paras. 12.3-12.5.

> Article 12 (4) of the UN Covenant states that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In *Stewart v. Canada* the Human Rights Committee held, with regard to a British national who was expelled from Canada, that "if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him". Reading Article 12 (4) in conjunction with Article 13, which refers to the expulsion of aliens "lawfully in the territory of a State party", the Committee maintained that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of Article 13". This would depend on "special ties to or claims in relation to a given country". The Committee referred to "nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them". The Committee also mentioned "other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence". On the contrary, foreign immigrants were excluded with one possible exception, which did not apply to the case in hand: "were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants".[64]

44. The author considers the issue to be controversial, however; the difficulty is as follows:

> Article 12 (4) assumes that a person can consider as his or her own only one country, while the foreign immigrants to whom the Committee referred were likely to have retained their nationality of origin and thus could have used the rights to enter and not to be expelled with regard to two different States: their State of nationality and the State of residence.[65]

45. The cases listed in the Committee's decision are fairly specific, however, and do not imply that every migrant alien could successfully claim the benefit of the Committee's broad interpretation of the notion of "his or her own country".

46. In any case, it is also acknowledged, in the literature and in practice, that some categories of persons who are not strictly speaking nationals of a State are not aliens either, in the sense of draft article 1 as proposed in the second report, and can therefore avoid expulsion. In this connection, the authors of *Oppenheim's International Law* write: "It [a State] may assimilate certain aliens to its own nationals, so affecting its powers under its own laws to expel them ...".[66] Thus, in the *Italian South Tyrol Terrorism* case, the Austrian Supreme Court decided that Italian nationals born in the South Tyrol could not be expelled from Austria, being subject to an Austrian law which required that they be treated as nationals for administrative purposes.[67]

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[64] Gaja, op. cit., pp. 292-293.

[65] Ibid., p. 293.

[66] Robert Y. Jennings and A. Watts, *Oppenheim's International Law*, 9th ed., vol. I — Peace (parts 2-4), 1996, p. 940.

[67] See Supreme Court, 8 October 1968, *International Law Reports*, vol. 71.

47. The current laws of a number of States enshrine this principle of non-expulsion by a State of its nationals. The same is true of the provisions of some international treaties, in particular the regional human rights conventions. Thus, article 22, paragraph 5, of the American Convention on Human Rights[68] provides unequivocally as follows: "No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it". In an expanded but equally explicit wording, article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights[69] stipulates that "[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national". The same prohibition may also be deduced, *a contrario*, from article 12, paragraph 4, of the International Covenant on Civil and Political Rights[70] and article 12, paragraph 2, of the African Charter on Human and Peoples' Rights.[71]

48. The right of a national to live in his or her own country is commonly considered an essential element of the relationship between a State and its nationals.[72] Moreover, given that an alien would presumably be expelled to his or her State of nationality, to what State would a national be expelled?[73] It is thus reasonable to assert that "[a] State is usually unable to expel its own nationals since no other State will be obliged to receive them".[74]

49. In this case, international law affirms or recognizes the principle, but it does not necessarily preclude the possibility of derogating from it.

(ii) Exceptions

50. As stipulated in article 3, paragraph 1, of the above-mentioned Protocol No. 4 to the European Convention on Human Rights, the rule of non-expulsion of nationals is categorical and does not seem to allow any exceptions. The account of the reasoning behind the Protocol[75] shows that the drafters of this text chose the wording deliberately because they thought it was possible, in the framework of the Council of Europe, to give the prohibition against the expulsion of a national by a State an absolute character which was difficult to impose in the framework of the United Nations.[76]

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[68] United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[69] See the text of this Protocol in *Human Rights: A Compilation of International Instruments*, vol. II, *Regional Instruments*, United Nations, document ST/HR/1/Rev. 5, p. 97.

[70] United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171. Article 12, paragraph 4, of the International Covenant provides as follows: "No one shall be arbitrarily deprived of the right to enter his own country".

[71] United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[72] See Doehring, op. cit., p. 110.

[73] According to Gaja (op. cit., p. 292): "The rationale of this prohibition and of the correlative obligation of the national State to admit its nationals is first to give individuals a fundamental right that allows them to avoid the risk of sharing the fate of the captain of the 'Flying Dutchman'. Moreover, the prohibition to expel nationals and the obligation to admit them give States other than the State of nationality the opportunity to proceed with an expulsion".

[74] See Jennings and Watts, op. cit., p. 940; see also Gaja (op. cit., p. 292), who writes: "It could well be said that expulsion of nationals is prohibited by international law".

[75] See document 1057 of 17 November 1959.

[76] See Danièle Lochak, "Commentaire de l'article 3 du Protocole n° 4" in Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert, eds., *La Convention européenne des droits de l'homme: Commentaire article par article*, 2nd ed. (Paris, Economica, 1999), p. 1054.

51. The absolute principle that seems to emerge from the letter of this provision does not, however, accurately reflect what the drafters had in mind. The explanatory report of the committee of experts that drafted the Protocol indicates that a person's right to enter the territory of the State of which he is a national cannot be interpreted as giving him an absolute right to remain in that territory; the report suggests the hypothetical example of an offender who, having been extradited by the State of which he is a national and then escaped from prison in the requesting State, could not claim an unconditional right to asylum in his own country.[77]

52. It is obvious, moreover, that the principle of non-expulsion of nationals by a State has seen some exceptions in the past, particularly in the late nineteenth and early twentieth century, mainly owing to specific political situations in certain States.

53. Thus, in France, under articles 2 and 3 of the law of 14 March 1872 (later abrogated by the law of 1 July 1901) establishing certain penalties against members of the International Working Men's Association, the authority to expel could be used against French nationals, who were sentenced for being members of the Association.[78] Similarly, the law of 22 June 1886, known as the "law of princes", banned from French territory the heads of former rulers of France and their direct descendants, and authorized the Government to ban other members of these families, pursuant to a decree handed down by a council of ministers. Although this law applied only to a specific and fairly small number of French nationals, it is nonetheless true that French citizens belonging to this category were expelled from France.[79] The French could also be expelled from "Christian protectorates".[80] They could likewise be expelled from the colonies until the edicts authorizing such action were lifted: the decrees of 7 and 15 November 1879 and 26 February 1880, among

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[77] Ibid. The violation of article 3, paragraph 1, of Protocol No. 4 was alleged in a number of failed petitions to the European Commission of Human Rights: see, in particular, the petition against the Federal Republic of Germany and Austria submitted by a German citizen who had been sentenced to four years' imprisonment in Austria and provisionally expelled to Germany in the context of a criminal proceeding, and who alleged that his forced return to Austria to serve his sentence was a violation of article 3, paragraph 1 (req. No. 6189/73, *DR* 46, p. 214); petition lodged by a Turkish national and his French wife against France, alleging that the expulsion of the husband after he had been permanently banned from French territory for violating the law on drugs had directly led to the expulsion of his French spouse from her own country (req. No. 11939/86, *Kilicarlsan v. France*, decision of 13 October 1987); petition from an individual being sought by the French police in a homicide case, who, having dual French and Israeli nationality, had taken refuge in Israel, where he considered that his extradition to France was a breach of article 3, paragraph 2 (req. No. 13287/87, *Nakache v. France*, decision of 15 October 1987).

[78] See Martini, op. cit., p. 38.

[79] Ibid., p. 40.

[80] Ibid., p. 40. Article 82 of the edict of June 1778 provides as follows: "In all cases concerning policy or the security of trade of our subjects ... our consuls may arrest and send back to France, on national vessels, any French national who, because of his misconduct or involvement in plots, could represent a danger to the public". This right of expulsion was confirmed by the law of 28 May 1836. Thus, French nationals could be expelled from Turkey, Egypt and Bulgaria because of the capitulations, from Chine and the Sultanate of Muscat under a law of 8 July 1852, and from Korea and Siam. They could also be expelled from Morocco under treaties signed between Morocco and the Western Powers; ibid., pp. 40-42).

others, took away the authority of the colonial governors that had been granted to them by earlier edicts.[81]

54. Historical examples of the expulsion of nationals, in general concerning fallen royal families and other cases of banishment, are very rarely replicated today.[82] Nonetheless, the wording of article 12, paragraph 2, of the African Charter on Human and Peoples' Rights, which seems to apply to both aliens and nationals, implies that in some cases the latter may be refused admission or return to their country (non-admission) and, by extension, be expelled from it if necessary. This article provides as follows: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

55. It is admittedly possible that the drafters of this Charter intended these restrictions to apply only to aliens. The lack of information on the preparation of this text, with the exception of some fragments, makes it impossible to determine with any certainty the drafters' intentions. In any case, one can envision the possibility that a State may, in some circumstances and for reasons of high-level policy or national security, expel its nationals, even in addition to the fairly frequent cases where the behaviour of State authorities forces certain nationals to flee into exile or become political refugees. The negotiated expulsion to Nigeria of Charles Taylor, former warlord turned head of State of Liberia, who was accused of committing many atrocities in his country, is one illustration. Admittedly, Taylor's departure from Liberia was negotiated between Taylor himself, the receiving State and several Western Powers that had a special interest in the Liberian situation; this was therefore not a unilateral decision on the part of the Liberian authorities. Still, in the particular case of that country, any new Government would have readily taken the decision to expel Taylor, provided there was a country willing to receive him. Indeed, the only absolute prerequisite to the expulsion of a national is the existence of a receiving State. In other words, a State cannot expel its nationals without the express consent of a receiving State.[83]

56. Of course, the expelled person has the right to return to his own country. The expelling State has the obligation, in this regard, to welcome the person back at any time at the request of the State that agreed to accept him or her. The expelling State cannot violate this right of return without placing its national in the same situation as that of a stateless person.

57. In view of the foregoing considerations, the following draft article is proposed:

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[81] Ibid., p. 42.

[82] It was no doubt with these historical examples in mind that the drafters of article 3, paragraph 1, of Protocol No. 4 to the European Convention on Human Rights used the term "exiled" (instead of "expelled") in the first draft of this provision, which was worded as follows: "No one shall be exiled from the territory of the State of which he is a national. Everyone shall be free to enter the State of which he is a national". Basically, it does not matter which term is used; as the Special Rapporteur has already explained in his second report (A/CN.4/573), the word "expulsion" was broadly used to denote a set of measures or actions carried out with the aim or having the effect of compelling an individual to leave the territory of a State, irrespective of the legality of his or her status. The European Commission of Human Rights understood the term the same way in the *Becker v. Denmark* case (req. No. 7011/75, decision of 3 October 1975, *DR*, 4, p. 215).

[83] See document A/CN.4/565, para. 36, and the unequivocal passages of the works cited in footnote 58 of that document.

Draft article 4
Non-expulsion by a State of its nationals

1. A State may not expel its own nationals.

2. However, if, for exceptional reasons it must take such action, it may do so only with the consent of a receiving State.

3. A national expelled from his or her own country shall have the right to return to it at any time at the request of the receiving State.

(b) Principle of non-expulsion of refugees

58. First, from the legal standpoint, the notions of "refugee" and "asylum seeker" need to be more clearly differentiated. Following current usage, especially the language of administration, some national laws or even the Convention implementing the Schengen Agreement now include applicants for refugee status in the category of "asylum seekers".[84] For example, article 1 of the Convention implementing the Schengen Agreement defines application for asylum as any application submitted by an alien with a view to obtaining recognition as a refugee in accordance with the 1951 Geneva Convention relating to the Status of Refugees and as such obtaining the right of residence. Indeed, a seeker of refuge, by his application, is requesting nothing other than that the territorial State offer him protection by allowing him to stay in its territory, which is no different from territorial asylum.

59. The two ideas of refuge and territorial asylum are, however, different and dissociated in legal terms. Under the heading "Asylum", article 2 of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa makes this distinction apparent. It provides that States members of OAU "shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality". This provision means that: (a) not all refugees are destined to become asylees; and (b) asylee status is determined by the national legislation of each State, unlike that of refugees, which is governed by international law. In other words, refugee status depends on international law, whereas territorial asylum is based solely on domestic law.[85] Consequently, the rules applicable to expulsion of the two categories of persons should be analysed separately, especially since there does not seem to be a rule for non-expulsion of asylees in international law.

60. With regard to the non-expulsion of refugees, an attempt will be made to construct the principle, before considering the derogations authorized by international rules and practice.

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[84] See Catherine Teitgen-Colly, "Le droit d'asile: la fin des illusions", *L'Actualité juridique — Droit administratif*, 20 February 1994, p. 99.

[85] In France, for example, territorial asylum is based on the preamble to the 1946 Constitution and the laws dealing with immigration control and the requirements for admission, reception and residency of aliens in France, in particular the law of 24 August 1993; see *Journal officiel de la République française*, August 1993, p. 12196.

(i) The principle

61. As discussed in the second report on the expulsion of aliens (A/CN.4/573, paras. 57-71), the definition of a refugee given by the 1951 Geneva Convention relating to the Status of Refugees is restrictive and liable to exclude various categories of persons who are considered refugees under regional international law and in contemporary literature and practice. In view of the definition contained in the 1951 Convention, which has been called Eurocentric in origin,[86] — in that its purpose was to protect political refugees who feared persecution in their countries of origin — and fundamentally "individualistic" because, under its authority, refugee status was granted only to individual persons, several authors have proposed even broader definitions of the concept of refugee.[87] Regional agreements have made it possible to fill the gaps in the 1951 Convention and the 1966 Protocol thereto and to deal with the massive flows of refugees produced in the 1960s and 1970s, in particular in Africa and Central America.

62. Whether or not to grant refugee status to members of the refugee's family depends on individual States: some laws are generous[88] while others are more restrictive.[89] In any case, once a person has been granted refugee status, his family

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[86] Oriol Casanovas, "La protection internationale des réfugiés et des personnes déplacées dans les conflits armés", *Recueil des cours de l'Académie de droit international*, vol. 306 (2003), p. 35.

[87] Some have argued that the definition should include persons who have carried out acts of resistance against oppressive regimes that deny the enjoyment of basic freedoms (see A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. I (Leiden, A. X. Sijithoff, 1966), pp. 220-225); or, more broadly, that the definition should cover persons who are fleeing countries where generally recognized human rights are being systematically violated (see T. Alexander Aleinikoff, "The meaning of 'persecution' in United States asylum law", *International Journal of Refugee Law*, vol. 3 (1991), pp. 12-13; J.C. Hathway, *The Law of Refugee Status* (Toronto, Butterworth, 1991), pp. 106-112). A much more inclusive interpretation has been that, in cases where many refugees are fleeing from situations of internal conflict and civil disorder, proof of persecution should not be required, and that a *presumption* of persecution should suffice for the 1951 Convention to be applicable to the candidate for refugee status (see D. J. Steinbock, "The refugee definition as law: Issues of interpretation", in *Refugee Rights and Realities: Evolving International Concepts and Regime*, F. Nicholson and P. Twomey, eds. (Cambridge, Cambridge University Press, 1998), pp. 34-35).

[88] In Cameroon, for example, article 5 of Act No. 2005/006 of 27 July 2005 on the status of refugees provides as follows:

"(1) The family members of a person considered as a refugee within the meaning of articles 2, 3 and 4 above who accompany or rejoin him are also considered as refugees, unless their nationality is other than that of the refugee and they enjoy the protection of their country of origin.

(2) If, after the head of family has been granted the status of refugee, family cohesion breaks down as a result of divorce, separation or death, the family members who have been granted refugee status under paragraph 1 above shall continue to enjoy such status, subject to the provisions of article 4.

(3) For the purposes of paragraphs (1) and (2) above, the family members of a person having refugee status shall consist of the refugee's spouse or spouses, minor children and other dependent family members

(4) Any decision taken pursuant to articles 3 and 4 of this Act shall not automatically affect the other family members as defined in paragraph (3) above".

The last paragraph of the article means, among other things, that the loss of refugee status or expulsion of the head of family does not automatically entail the loss of refugee status or the expulsion of the refugee's family.

[89] Thus, in France, whereas the law of 2 August 1989 extended the benefit of the residence permit to members of the refugee's family (his spouse and minor children), the law of 24 August 1993

members receive legal protection in the form of provisions stipulating that they may be expelled only for specific and limited reasons.

63. The principle of the non-expulsion of refugees is, however, worded in a negative way, which limits its scope by preventing it from being an absolute prohibition. Thus, article 32, paragraph 1, of the 1951 Geneva Convention relating to the Status of Refugees provides as follows:

> The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

64. This provision demonstrates that the principle of non-expulsion of refugees may be established, but only by deduction. Indeed, in the structure of this provision, the word "save" introduces an extreme limit to the rule that the refugee cannot be expelled. In other words, refugees cannot, in principle, be subject to expulsion measures; they cannot be expelled except — if absolutely necessary, so to speak — for two, non-cumulative reasons, namely, national security or public order.

65. The 1969 OAU Convention, for its part, introduces the idea of "voluntary repatriation", which does not appear in the 1951 Convention and the 1967 Protocol thereto. Strictly on the basis of the idea as embodied in article V of the OAU Convention, it might be concluded that there is an absolute principle of non-expulsion of refugees — in the broad sense in which the concept of expulsion was defined in the second report. Article V, paragraph 1, of that Convention reads as follows:

> The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

However, not only should the 1969 OAU Convention — like the 1984 Cartagena Declaration on Refugees for Central America — be seen as complementary to the 1951 Geneva Convention, but "expulsion" and "repatriation" should be viewed as different concepts, subject to different procedures set in motion by causes that are not identical.

66. Article 33 of the 1951 Convention also seems to set forth a principle of non-expulsion, but it is immediately attenuated by the fact that, on the one hand, it refers to a special case where there would be risks of violating certain fundamental rights of refugees and that, on the other, expulsion may be permitted for certain specific reasons. Under the somewhat misleading heading of "Prohibition of expulsion or return", the above-mentioned article provides as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a

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on immigration control and conditions of admission, reception and residency of aliens in France and subsequent amendments thereto have marked a setback in that regard, in that they require the members of the refugee's family to meet the same conditions for a regular residence permit as do other aliens (art. 15, para. 1, of the law of 24 August 1993).

final judgement of a particularly serious crime, constitutes a danger to the community of that country.

67. A comparison between article 32 and article 33, in particular with regard to their titles, implies, prima facie, that article 32 sets forth a permissive rule, whereas article 33 stipulates a prohibitive norm. In fact, this is not the case. Each provision contains both a prohibition and an authorization. Paragraph 2 of article 33 expands the range of reasons for the expulsion of refugees as set out in article 32, paragraph 1. Thus, whereas the latter provides only for grounds of "national security or public order", article 33, paragraph 2, instead uses the wording "... danger to the security of the country", and adds "a final judgement of a particularly serious crime, constitut[ing] a danger to the community of that country". This last-mentioned reason is especially vague, in that it fails to specify the nature and seriousness of the "danger" in question. Moreover, how does such a reason differ from "grounds of public order"? At any rate, it strengthens the expelling State's discretionary power in the case of the expulsion of a refugee, and thereby demolishes the strict limits established in article 32, paragraph 1. Unlike paragraph 2 of article 33, paragraph 1 reinforces the principle of non-expulsion by stating the circumstances that would produce the "prohibition" — although not absolute, because of the stipulations contained in paragraph 2 — of the expulsion or return of the refugee.

68. The Special Rapporteur holds the view that the principle is therefore not a matter of expulsion, but of non-expulsion, since expulsion is merely an exception which is, moreover, only permitted on certain very limited grounds.

69. One tendency today is to consider that a State which receives refugees — not refugees in the strict sense, but persons who are forced to flee their country because they are victims of armed conflicts or of events that have disturbed the public order, in whole or in part, of their country of origin, nationality or habitual residence[90] — should admit them to its territory and scrupulously observe the fundamental principle of non-refoulement, including non-rejection at the frontier.[91] Underlying this idea is a presumption that any member of a group of persons who have fled their country for the reasons indicated above is considered, prima facie, as a refugee, barring any evidence to the contrary. Along these same lines, one author has recently written that States have a "customary obligation" of non-refoulement of persons fleeing armed conflicts or generalized violence.[92] This goes well beyond the relevant treaty obligations. If such an obligation exists, it carries the correlate obligation not to expel the type of "refugees" in question, namely, those who have not yet been granted refugee status and who might therefore find themselves in the receiving territory illegally — at least before their situation has been considered by the competent national authorities.

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[90] See the declaration adopted in Sevilla in February 1994 during a workshop on "Refugees: law and solidarity", cited by Casanovas, op. cit., p. 82.

[91] Office of the United Nations High Commissioner for Refugees, Executive Committee Conclusions, No. 22 (XXXII), 1981, "Protection of Asylum-Seekers in Situations of Large-Scale Influx", para. II A (1); and No. 19 (XXXI), 1980, "Temporary Refuge", para. (b) 1. *Contra*, K. Hailbronner, "Non-refoulement and 'humanitarian' refugees: customary international law or wishful legal thinking", *Virginia Journal of International Law*, vol. 26 (1985-1986), p. 857.

[92] Anne V. Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague, Martinus Nijhoff, 2002), p. 165.

70. This doctrinal trend derives from article 31 of the Convention relating to the Status of Refugees, entitled "Refugees unlawfully in the country of refuge", which provides as follows:

> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

71. This principle also finds significant support in the recent work of the Global Commission on International Migration, which was launched in December 2003 on the initiative of the Secretary-General of the United Nations, acting at the request of the General Assembly. The Assembly, in its resolution 58/208 of 23 December 2003, had decided to devote a high-level dialogue to international migration and development during its sixty-first session in 2006 (see A/60/205). The Global Commission declares that, in their efforts to stem irregular migration, States must respect their existing obligations under international law towards the human rights of migrants, the institution of asylum and the principles of refugee protection.[93] In that regard, the Commission bases itself on the principle set forth in the Agenda for Protection established by the Office of the United Nations High Commissioner for Refugees (UNHCR), pursuant to which the institution of asylum should not be undermined by the efforts of States to stem clandestine or illegal immigration. The Commission urges all States to establish fast, fair and efficient refugee status determination procedures, so that asylum-seekers are quickly informed of the outcome of their case. In particular, it recommends that:

> In situations of mass influx, States should consider offering the new arrivals prima facie refugee status, a practice used to good effect for many years in Africa and developing countries in other regions.[94]

72. Non-expulsion of the persons concerned while their status is being determined is similar to "temporary protection", which in turn differs from "subsidiary protection". The Lauterpacht and Bethlehem report, prepared for the Global Consultations on International Protection sponsored by UNHCR, considers that "[t]emporary protection, which is a specific provisional protection response to situations of mass influx providing immediate emergency protection from refoulement, should be clearly distinguished from forms of complementary protection which are offered after a status determination and which provide a definitive status".[95] Such protection is granted to persons belonging to a specific group, on the basis of a political decision. On the other hand, "subsidiary protection", which is found in the legislation of European Union countries, among others, is a legally established status granted in individual cases.[96]

73. Some national laws apply temporary protection to applicants for refugee status. The French practice is quite interesting in that regard. Thus, unlike the 1951 Geneva

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[93] See *Migration in an interconnected world: New directions for action*, Report of the Global Commission on International Migration, October 2005, chap. III, p. 40. The report is available at the following address: <www.gcim.org>.

[94] Ibid.

[95] Elihu Lauterpacht and Daniel Bethlehem, "Complementary forms of protection", *Global Consultations on International Protection*, OHCHR document EC/GC/01/18 of 4 September 2001, para. 11 (g).

[96] See Casanovas, op. cit., p. 127. See also Vincent Chetail, "Le droit des réfugiés à l'épreuve des droits de l'homme: le bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains et dégradants", *Revue belge de droit international*, 2004, No. 1, pp. 155-210.

Convention, which simply prohibits the contracting parties from returning or expelling a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened", the fourth preambular paragraph of the French Constitution of 27 October 1946, to which the current Constitution of 4 October 1958 refers, implies, according to the French Constitutional Council, "in general that an alien who claims this right should be permitted to remain temporarily in the territory until a decision has been taken on his claim".[97] This solution is directly based on the one accepted by the Assembly of the French Council of State, which, in two cases, has recognized that an asylum-seeker claiming refugee status should be allowed to remain provisionally in French territory until the French Office for the Protection of Refugees and Stateless Persons or, where applicable, the Refugee Appeals Commission, has ruled on his or her application.[98]

74. The basis of this "principle" — to use the term proposed by one author[99] — as applied by the Council of State is different from that used by the Constitutional Council: for the latter, the basis is the preamble to the Constitution, whereas for the former it consists of both article 31, paragraph 2, of the 1951 Geneva Convention and the law of 25 July 1952 establishing the French Office for the Protection of Refugees and Stateless Persons. In any case, its acceptance in case law has been accompanied by restrictions. In its decrees, the Council of State accepts that in cases where the sole purpose of such a claim is to thwart a deportation order against an alien who is already present in the country in an irregular situation, the administration is exempted from issuing the documents authorizing asylum-seekers to remain in France pending the decision of the Office for the Protection of Refugees and Stateless Persons or, on appeal, the judgement of the Refugee Appeals Commission.[100]

(ii) Derogations

75. A refugee cannot be expelled from the territory of the receiving State except for reasons of security and public order. As noted above, these derogations, which are internationally enshrined in article 31 of the 1951 Convention relating to the Status of Refugees, have long been recognized and practised in domestic law. There is consequently no need to dwell upon whether or not they exist. Nonetheless, it is worth analysing the exact content and meaning of the notions of endangerment of security and threat to or endangerment of public order. This is not an easy issue to deal with, since the determination of how to characterize a given situation may vary, depending on the State, epoch and context. There is no doubt that the authority to evaluate such endangerment or threats rests with each State, and that both international and national laws recognize this fact.

76. Terrorism, a phenomenon which has seen an unprecedented spread in recent times and become a source of concern to States, could be included in the notions of security and public order, in particular that of security. But its blind and indiscriminate violence and devastating effects single it out for special treatment.

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[97] Constitutional Council, decision No. 93-325 DC of 13 August 1993, *Journal officiel*, 18 August 1993, pp. 11722 ff.

[98] See Council of State, Assembly, 13 December 1991, *M. Nkodia et préfet de l'Hérault c. Dakoury*, in *Revue française de droit administratif*, January-February 1992, pp. 90-103.

[99] See Véronique Fabre-Alibert, "Réflexions sur le nouveau régime juridique des étrangers en France", *Revue de droit public et de la science politique en France et à l'étranger*, 1994, No. 2, p. 1184.

[100] Ibid.

This has been the approach taken by the international community in dealing with acts of terrorism, which are not considered ordinary crimes.

77. Security Council resolution 1373 (2001) can be taken to imply that a refugee may be expelled for the commission of terrorist acts or acts relating to terrorism. In paragraph 2 (d) of this resolution, the Security Council "[d]ecides" that all States shall:

> Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

In paragraphs 3 (f) and (g), the Council "calls upon" States to:

> (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
>
> (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

78. In the light of these provisions, an actual refugee alien, that is, a person who, fearing for his life, has fled his State of origin but has not yet legally acquired refugee status, could be expelled on grounds of being involved in terrorist activities or facilitating the commission of terrorist acts. The resulting obligation to refuse refuge or asylum implies the right of expulsion if the receiving State is faced with the situations described in the relevant paragraphs of resolution 1373 (2001).

79. At the level of State legislative practice, section 22 of the Tanzanian Prevention of Terrorism Act 2002 offers an example of legislation designed to prevent a country's territory from being used as a safe haven from which attacks can be launched against other States;[101] it may, where appropriate, serve as a legal basis for the expulsion of aliens, including refugees.

80. The special case of terrorism and its recognition as one of the criteria for derogation from the principle of non-expulsion of refugees has more to do with the progressive development, rather than the codification, of a well-established customary rule. Nonetheless, the adoption of such a criterion would not be without its support, in respect of both the comprehensive body of international law and in State legislative practice. The fact that such a criterion may be based on a Security Council resolution is also relevant, given the principle of legality which underlies the Council's decisions.

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[101] Section 22 of this Act punishes recruitment for or association with a terrorist group and training in the United Republic of Tanzania for acts prohibited by paragraph (a) of the Section. The prohibition in paragraph (a) applies to acts in that country intended to promote or facilitate violent acts in a foreign State and whether or not their objective is achieved; see Office on Drugs and Crime, *Preventing terrorist acts: A criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*, Technical assistance working paper, United Nations, New York, 2006, p. 26.

81. On the basis of the foregoing, the following draft article is proposed:

Draft article 5
Non-expulsion of refugees

1. A State may not expel a refugee lawfully in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgement of a particularly serious crime or offence, constitutes a danger to the community of that State.

2. The provisions of paragraph 1 of this article shall also apply to any person who, being in an unlawful situation in the territory of the receiving State, has applied for refugee status, unless the sole manifest purpose of such application is to thwart an expulsion order likely to be handed down against him or her [against such person].

(c) Principle of non-expulsion of stateless persons

82. Although the stateless person and the refugee differ in legal status, the two situations often have the same cause, namely, that the person concerned is fleeing from armed conflict or persecution on racial or political grounds. In its resolution adopted at its 1936 session in Brussels on the legal status of stateless persons and refugees, the Institute of International Law affirmed that the term "stateless person refers to any person who is not considered by any State to hold its nationality".[102] Nationality was thus, following the thinking of the nineteenth century — the "century of nationalities" — the essential element and benchmark for determining whether or not a person was considered a stateless person. In a more modern and open approach, in line with that proposed by the Special Rapporteur in his second report (A/CN.4/573), the Convention relating to the Status of Stateless Persons, concluded in New York on 28 September 1954, replaced the nationality criterion with the term "a national", which, as we have seen, is much more comprehensive. Article 1, paragraph 1, of that Convention specifically states:

> For the purpose of this Convention, the term "stateless person" means a person who is not considered *as a national* by any State *under the operation of its law*.[103]

83. The principle of non-expulsion of stateless persons was already an underpinning of one of the articles of the International Rules on the Admission and Expulsion of Aliens, adopted by the Institute of International Law on 12 September 1892, which reads as follows:

> In principle, a State shall not prohibit access into or a stay in its territory either to its subjects or to those who, having lost their nationality in that State, have acquired no other nationality.[104]

84. The explicit wording and codification of the rule came much later. Referring back to the framework of the 1951 Geneva Convention relating to the Status of Refugees, the 1954 New York Convention confirms the similarity between the status

[102] *Annuaire de l'Institut de droit international*, vol. XXXIX, t. II, 1936, Brussels session, p. 294.
[103] United Nations, *Treaty Series*, vol. 360, No. 5158, p. 117; emphasis added.
[104] *Annuaire de l'Institut de droit international*, vol. XII, 1892-1894, Geneva session, p. 219.

of stateless persons and that of refugees. With regard to expulsion, in particular, the two conventions set forth the same rules governing the subject in both cases. Using the same wording, mutatis mutandis, as the three paragraphs of article 32 of the 1951 Convention, article 31 of the 1954 Convention provides as follows:

> 1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons especially designated by the competent authority.
>
> 3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

85. The comments made with regard to article 32, paragraph 1, of the 1951 Convention (para. 64 above) also apply to article 31, paragraph 1, cited above.[105]

86. It should be noted that, as with refugees, only documented stateless persons are covered. Of course, the issue of stateless persons residing unlawfully in the territory of the host country is sensitive, as some undocumented migrants may fraudulently claim that they are stateless. What is to become, however, of the genuinely stateless persons who nevertheless reside unlawfully in the territory of a State? Could the State expel them? To which country could they be sent? To their last country of residence? Under what conditions? Those provided for in article 31, paragraph 3, for stateless persons residing unlawfully in the territory of the State? These questions could call into doubt the relevance of the distinction between documented stateless persons and undocumented stateless persons in the light of article 31, paragraph 1. Furthermore, aside from persons who become stateless while they are already in the territory of the host State, most others can enter such a State only by unlawful means, as they do not generally possess the official State documents required for admission into another country.

87. Paragraph 2 of article 31 cited above deals with the conditions and procedures for expulsion; we shall refer back to it when we take up this issue.

88. Concerning paragraph 3, the first sentence raises some questions. Specifically, how can stateless persons in the process of being expelled seek admission into a new host country? Must their efforts be limited to countries with diplomatic missions in the expelling State? Will not their chances of succeeding in their efforts be limited if this host State has only a few foreign diplomatic missions? Moreover, even assuming that the expelling State is particularly generous in its interpretation of the notion of "reasonable period" and grants the stateless person a sufficient

[105] Pursuant to article 9 of the 1954 Convention, a particular person may be expelled as a provisional measure in time of war or other grave and exceptional circumstances pending a determination by the Contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

length of time, what will happen during this period if the efforts of the stateless person led nowhere? May the State expel the person nevertheless? If so, to which country?

89. These questions, particularly the last one, do not merely reflect theoretical concerns. The *John K. Modise v. Botswana* case before the African Commission on Human and Peoples' Rights[106] shows that these questions may be raised in practice. The complainant argued that he was unjustly deprived of his Botswana citizenship. He claimed the right to citizenship under the following circumstances: his father, Samuel Remaphoi Modise, a citizen of Botswana as a former "British subject" of Bechuanaland (present-day Botswana), immigrated to South Africa for work. During his stay, he married Elisabeth Ikameng Modise, and John Modise was born of this marriage. His mother died when he was three months old and his father took him to the Bechuanaland Protectorate to ensure that he would be cared for by his relatives. The complainant consequently grew up in the Protectorate and lawfully returned there after trips abroad.

90. In 1987, John Modise was one of the founders and officials of an opposition party called the Botswana National Front. He believes that it is because of his political activities that he was declared an "undesirable immigrant" by the Government of Botswana. On 17 October 1998, he was arrested and deported to South Africa, where he was handed over to the police without being brought before a tribunal. Having returned to Botswana, he was once again arrested and deported without trial to the same country. After his third attempt at returning, he was charged, convicted of illegal entry and declared an undesirable immigrant. He was serving a 10-month prison term and had filed an appeal when he was deported for the fourth time to South Africa, before the case was concluded. The Commission noted that "since the Complainant did not have South African nationality, he was obliged to settle in the 'homeland' of Bophutatswana". He lived there for seven years until the government of this "bantustan" issued a deportation order against him and he found himself in the no-man's land between Bophutatswana and Botswana, where he remained for five weeks before being admitted into Botswana on a humanitarian basis. He obtained a three-month entry permit, renewable at the entire discretion of the competent Ministry, until June 1995.[107]

91. Here is not the place to enter into a discussion on the main point of contention raised by the respondent State, namely, whether John Modise could not or had not become a citizen of Botswana by descent in accordance with the former Constitution of that country, given that he was neither a British subject nor a citizen of the United Kingdom and its colonies when Botswana attained independence in 1966. The African Commission on Human and Peoples' Rights resolved the question: John Modise is indeed a citizen of Botswana by descent, as he is the son of his father, himself a citizen of Botswana, and the Government of Botswana must take appropriate measures to recognize this nationality and compensate him adequately for all the damages which he has sustained as a result of the violation of his rights.

92. The main interest of this case with respect to the issue of the expulsion of stateless persons is that Botswana had continued to deport John Modise even though

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[106] See Communication No. 97/93, *John K. Modise v. Botswana*, presented at the twenty-eighth ordinary session of the Commission in November 2000 in Cotonou, Benin, decision of 6 November 2000.

[107] Ibid.

it was found that he had the nationality of neither South Africa nor Bophutatswana and, moreover, not having the nationality of Botswana, which the authorities of this country had denied him, he found himself in a situation of statelessness. It should be noted that in this case none of the grounds for expulsion of a stateless person provided for under article 31 of the 1954 Convention — either national security or public order — had been invoked by the expelling State; a host country was not found by the expelled person and the expelling State had never made a request for him to do so. In short, Botswana did not act within the context of expelling a stateless person, although such a context clearly applied.

93. It seems that the rules for the expulsion of stateless persons too easily reproduced the wording of the rules for the expulsion of refugees, given that — it bears repeating — asylum and statelessness are entirely different situations. Refugees possess a known nationality. They are generally in a situation of distress caused by an irresistible force for which they are not generally responsible. For this reason, their situation as victims elicits some compassion or simple understanding which could pave the way for entry into a host State. The same does not go for stateless persons. Deprived of their nationality, stateless persons cannot travel abroad unless the host State considers them as having the rights and obligations related to the possession of nationality of that State and consequently issues them a passport. Otherwise, any host State party to the Convention relating to the Status of Stateless Persons of 28 September 1954 is required only to accord to stateless persons "the same treatment as is accorded to aliens generally".[108] We can well imagine how a person without any nationality, who in principle enjoys only the rights granted to foreigners in the country of residence, might have serious difficulties in finding a host State; furthermore, if the person is expelled, it is either because he or she has committed offences against the national security of the expelling State or constituted a threat to national security or because he or she is said to have committed an offence against the public order or constituted a serious threat to it.

94. Unless a person has relations with a foreign power which would be willing in principle to host him or her, it would not be practical for such a person "to lawfully obtain admission into another State". According to the Special Rapporteur, the intervention of the expelling State in the search for a host State for the expelled stateless person may be deemed necessary. Such an intervention could be envisaged if the steps taken by the stateless person to obtain legal admission into another host State prove unsuccessful. The protection of the rights of expelled persons requires, however, that they consent to the country to which they would thus be deported.

95. Nevertheless, given that the practice of States with respect to the expulsion of stateless persons is woefully inadequate, such an idea can only be drawn from an analysis of the provisions of the aforementioned paragraph 3 of article 31 (see para. 84). At best, the idea may be put forward as part of the progressive development of international law.

96. The following draft article is being proposed in the light of the foregoing considerations. It includes in the first paragraph the core of article 31, paragraph 1, of the 1954 Convention, with some stylistic changes, and in paragraph 2 a new

[108] See article 7 of the Convention.

version of the first sentence of paragraph 3, enhanced by the above-mentioned suggestions:

Draft article 6
Non-expulsion of stateless persons

1. A State may not expel a stateless person [lawfully] in its territory save on grounds of national security or public order [or terrorism], or if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State.

2. A State which expels a stateless person under the conditions set forth in these draft articles shall allow such person a reasonable period within which to seek legal admission into another country. [However, if after this period it appears that the stateless person has not been able to obtain admission into a host country, the State may [, in agreement with the person,] expel the person to any State which agrees to host him or her].

(d) Principle of prohibition of collective expulsion

97. The practice of collective expulsion is not a recent phenomenon. In the past, it was often closely related to situations of armed conflict or serious crises between two States; nevertheless, collective expulsions have been carried out in time of peace as well as in time of war.

(i) In time of peace

98. Indeed, apart from cases of war, collective expulsion was carried out by the United States Government in the nineteenth century.[109] Having granted subjects of the Celestial Empire, in an 1863 treaty, treatment equal to that enjoyed by United States citizens, the United States Government, faced with the steadily increasing influx of what was derogatorily called the "yellow immigration" or "yellow peril", ceased to fulfil the terms of the treaty and then negotiated with China a new treaty, the Treaty of 17 November 1880, granting it the right to suspend or limit the immigration of labourers "whenever it deems it necessary for the protection of its interests". Two years later a United States law suspended immigration for a period of 10 years. But before the expiry of this period, United States Government obtained, on 12 March 1888, the signature of the "Chinese Minister to Washington" to a treaty prohibiting the entry into United States territory of "any labourers of the yellow race" for 20 years. The Chinese Government refused to ratify a treaty which it deemed not only unfavourable to the interests of its nationals but also vexatious and overly restrictive in its provisions. In the light of this refusal, the United States of America enacted a law on 1 October 1888, which prohibited de facto immigration of Chinese workers into United States territory, and later a second law called the Chinese Exclusion Act, which imposed very strict conditions of stay on Chinese labourers,[110] thus leading to a collective expulsion by virtue of the State's conduct.

[109] Darut, op. cit., p. 46.
[110] Ibid., pp. 47-48.

99. In Europe, there were cases of collective expulsion dating back to the seventeenth century. Thus, in Spain, in strict violation of the prevailing principles of international law, a 1703 law, which long remained in force, ordered the mass expulsion of all British and Dutch subjects who were not Catholic; in Russia, a 1793 law enacted by Emperor Paul I ordered French nationals residing in Russia, under penalty of expulsion, to renounce the atheistic and seditious doctrines of their countries of origin.[111]

100. Later, in the twentieth century, following numerous, serious and persistent difficulties between Germany and Poland subsequent to the demarcation of borders between these two countries in accordance with the Treaty of Versailles, Germany expelled "en masse", as was said at the time, Polish workers residing in its territory: it had expelled 25,000 such workers by late 1922. As a means of retaliation, the Polish Government expelled in turn a number of German nationals in April 1923 and undertook new retaliatory measures in January 1924 by expelling 14 German families, as the Government of Bavaria had expelled 14 Jewish families of Polish nationality. In addition, as other mass expulsions of Polish citizens had taken place in Mecklenburg-Schwerin in Germany, despite protests from the Polish Minister in Berlin, Poland took the retaliatory measure of expelling 150 Germans residing in the Poznan and Pomerania districts.[112]

101. Other than by the political protests of Governments whose nationals have been victims of these mass expulsions, such expulsions have not been contested on the basis of international law. The literature of the period saw nothing but the exercise by the expelling States of the "right to expel aliens" recognized by international law.[113] This emerges clearly from the opinion of some authors of the period. Thus, following the annexations and de-annexations enshrined in the peace treaties which ended the First World War and which occasioned the frequent exercise of the right of expulsion, France was faced with the question, as a result of the reintegration of Alsace and the part of Lorraine annexed to Germany by the Treaty of Frankfurt, of whether it should limit the change of nationality to former French nationals. About 500,000 Germans representing 28 per cent of the population lived in these recuperated *départements*. There was a vague notion that to keep them would have represented "a danger to France". The question was whether to expel them en masse or absorb them. Two prominent French authors of the period, Pillet and Niboyet, responded:

> Mass expulsion would have been by far the better alternative, if we could have ensured that Alsace and Lorraine would have the same population. However, our population level was too low for this goal to be envisaged.[114]

102. In other words, the collective expulsion of aliens, even in time of peace, was not prohibited; it had been ruled out in this case only for the sake of expediency.

103. The prohibition of such expulsions came much later in the form of a remedy to a regional human rights instrument which was silent on the issue: Protocol No. 4[115]

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[111] Ibid., p. 37, note 1.

[112] See Paul Fauchille, *Traité de droit international public* (Paris, A. Rousseau, 1926), vol. I, 3rd part, *Paix*, pp. 688-689.

[113] See de Boeck, op. cit., p. 471.

[114] Antoine Pillet and Jean-Paulin Niboyet, *Manuel de droit international privé* (Paris, Sirey, 1924) No. 170, p. 213.

[115] Protocol signed in 1963 in Strasbourg, in force since 1968.

to the European Convention on Human Rights, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto. Article 4 of Protocol No. 4 states concisely that "[c]ollective expulsion of aliens is prohibited".

There is a similar provision — with a stylistic difference relating to the use of the singular — in the American Convention on Human Rights, which in article 22, paragraph 9, specifies that "[t]he collective expulsion of aliens is prohibited". The African Charter on Human and Peoples' Rights contains the nearly identical provision in article 12, paragraph 5: "The mass expulsion of non-nationals shall be prohibited."

104. According to the committee of experts responsible for preparing draft Protocol No. 4 to the European Convention, it was necessary to include this provision, which did not appear in the initial draft, so as to prevent the recurrence of mass expulsions "of the kind which had occurred in recent history", as noted in a memorandum of the Directorate of Human Rights of the Council of Europe.[116]

105. Several applications filed with the European Commission of Human Rights to punish States parties to Protocol No. 4 for violating article 4 thereof have been unsuccessful for various reasons, as set out by the Commission in its relevant decisions.[117] The European Court of Human Rights declared that article 4 had been violated in the case of *Čonka and Others v. Belgium*. The applicants were Ján Čonka and his wife and two children. As Slovaks residing in Belgium, where they requested asylum, they were subject to deportation orders issued by the Ministry of Internal Affairs on 18 June 1999 denying their request for asylum and requiring them to leave the territory within five days. The Court noted the following with respect to the deportation orders:

> The only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. [...] In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the

[116] Directorate of Human Rights, DH/Exp. (61) 37 of 27 November 1961, mimeograph, *Recueil des «Travaux préparatoires» du Protocole No. 4*, p. 446.

[117] Lochak notes that these clarifications led the Commission to dismiss several applications, including: the application of persons from Suriname who sought asylum in the Netherlands after the coup d'état of 1982 and whose presence the Government of the Netherlands had tolerated, without, however, granting them a residence permit until 1988, at which time, given that Suriname was on the path towards democracy, it notified them of individual decisions requiring them to leave the Netherlands, from which they were ultimately expelled (application No. 14209/88, *Alibaks and Others v. the Netherlands*, decision of 16 December 1988; application No. 14457/88, *B. and Others v. the Netherlands*, decision of 16 December 1988); application of seven members of the Church of Scientology with Swiss nationality residing in Copenhagen who had been expelled following the denial of a renewal of their residence permits. The Commission did not have to express an opinion on the merits, on the grounds that the applicants had not exhausted local remedies and that their application was inadmissible (application No. 12097/86, *Künzi-Brenzikofer and Others v. Denmark*, decision of 13 July 1987). There is no doubt, however, that such an application could not have succeeded on the merits, given that the residence permit is individual and its date of expiry affects its holder individually so that the expulsion at the same time of several persons in this situation could not be considered as a collective expulsion.

> applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.[118]

106. The doubt expressed by the Court was reinforced by a series of factors: firstly, prior to the deportation of the persons concerned, the Belgian political authorities had announced that there would be operations to detain aliens and had given instructions to the relevant authorities for the implementation of these operations; secondly, the Court had required all the aliens concerned to report to the police station at the same time; thirdly, the orders requiring them to leave the territory were couched in identical terms; fourthly, it was very difficult for the aliens concerned to contact their lawyers; lastly, the asylum procedure had not been completed. In short, at no stage in the period between the service of the notice to the aliens to report to the police station and their expulsion did the procedure afford sufficient guarantees "demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there has been a violation of article 4 of Protocol No. 4 to the Convention".[119]

107. Collective expulsion is based on the sole fact that expelled persons are aliens,[120] and for that reason it is intellectually and morally difficult to accept. The European Commission of Human Rights provided an interesting definition when it considered the application against the plan of the Danish Government to repatriate 199 Vietnamese children sheltered in Denmark. According to the Commission,

> [...] "Collective expulsion" is to be understood as any measure by the competent authorities compelling aliens, as a group, to leave a country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[121]

108. The second phrase of article 12, paragraph 5, of the African Charter on Human and Peoples' Rights makes a clarification by indicating the groups concerned:

> Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

This clarification, however, has a restrictive meaning of the notion of a group. In fact, collective expulsion may involve a group of persons who are not part of any of the groups mentioned. For example, it is common to speak of "Africans" to refer to nationals of various countries of Africa and consequently to "illegal African immigrants", as if Africa constituted a single State or nation. It is perfectly conceivable that a group of Africans might be subjected to a collective expulsion measure even though they do not constitute a national group, much less an ethnic group, and without there being any religious grounds for such action. It is better, therefore, to maintain the open approach to the notion of group contained in the definition of the European Commission of Human Rights.

109. The idea of examining the individual case of each member of a group of persons subject to expulsion has already been implemented in some mass expulsions in the early twentieth century. For example, when the Government of France

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[118] *Čonka v. Belgium*, Judgment, 5 February 2002, para. 61.

[119] Ibid., para. 63.

[120] See Danièle Lochak, "Commentaire de l'article 4 du Protocole n° 4", in Louis-Edmond Pettiti et al., op. cit., p. 1057.

[121] Quoted by Lochak, ibid., p. 1058.

decided to use its right of expulsion against German nationals after the First World War, "on 12 August 1922, 500 Germans designated by decree were expelled from Alsace and Lorraine".[122] Nevertheless, in the light of the considerations of the aforementioned *Čonka and Others v. Belgium* case before the European Court of Human Rights, can it really be said that it was not a matter of collective expulsion? This is open to doubt, as it is unlikely that the French authorities had considered in a thorough and sufficiently objective manner the individual case of each of the 500 expelled persons.

110. It should be noted, however, that the need for separate consideration of the various cases and individual measures for each of them does not necessarily mean that the competent authorities must reach decisions which vary in substance. The fact that deportation orders are identically worded is not in itself sufficient for them to be regarded as constituting collective expulsion in accordance with relevant international legal instruments, as long as every order is preceded by specific consideration of the situation of each member of the group of persons concerned.[123]

111. This rule on separate consideration of the situation of each person to be expelled, which was not contained in the aforementioned article 4 of Protocol No. 4 but was clearly set forth by the case law of the European Commission of Human Rights, as discussed above, was formally enshrined within the framework of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[124] Article 22, paragraph 1, of this Convention reads as follows:

> Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

112. As we can see, the principle of prohibition of collective expulsion of aliens is enshrined in European, inter-American and African positive regional law; at the international level, it seems to be limited to migrant workers and their families.

113. Does this mean that it is not (yet) a universal rule, deriving from either treaty-based or customary law? The question is worth considering, especially since State practice in this matter seems to vary. The responses of certain States members of the Organization of American States to the questionnaire prepared by the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere is telling in this regard. In answer to the first question, namely "Can any determined group of immigrant workers and their family members be expelled as a group from your country?", some States said "no" outright[125] while the response of others was an outright[126] or tacit[127] "yes".

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[122] See de Boeck, op. cit., p. 469.

[123] See Lochak, op. cit., p. 1058.

[124] Adopted by the United Nations General Assembly in its resolution 45/158 of 18 December 1990. The text of this Convention, which entered into force on 1 July 2003, is included in the United Nations Treaty Series, vol. 2220, No. 39481, p. 3.

[125] Canada, the Dominican Republic, Grenada and Mexico said "no" outright; see progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere, op. cit., sect. IV (b) (5).

[126] Colombia, Ecuador, Guatemala and Honduras said "yes" outright (ibid.).

[127] Brazil gave a rather lengthy reply in order to obscure the fact that, under its legislation, it is possible to practise collective expulsion: "To determine the expulsion of an alien who is

114. In fact, many States still practise collective expulsion to this day, including in parts of the world where countries are bound by a legal instrument prohibiting it. This is the case in Africa,[128] and in South America[129] as well; and who is to say that this does not happen in Europe?[130]

115. Apart from the (de facto) organized repatriation of refugees living in UNHCR "refugee camps", there is no doubt that such collective expulsions are contrary to the three regional human rights conventions referred to above. Furthermore, it seems reasonable to suggest that there is a general principle of international law on this matter that is "recognized by civilized nations" and prohibits collective expulsion. First of all, it would follow from the fact that if the admission of an alien is an individual right, the loss or denial of this right can only be by an individual act. Second, this rule against collective expulsion is enshrined in three regional human rights conventions that, among them, cover most States members of the international community. After all, Article 38 of the Statute of the International Court of Justice does not require that general principles be recognized by *all* "civilized nations".

(ii) In time of war

116. The question is whether such a principle can be applied in a situation of armed conflict. In past centuries, the practice of collective expulsion of aliens in time of war was not unusual. In the eighteenth century, under the Treaty of Utrecht of 1713 and an Anglo-Russian Treaty of 1760, enemy subjects residing in the territory of belligerent Powers were ordered to leave within a certain time limit. Similarly, in 1798, Congress authorized the President of the United States of America to expel nationals of enemy States under the same conditions.[131]

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lawfully or unlawfully in the country. It is applied to an alien who in any manner poses a threat to national security, political or social order, public morals or the national economy, or whose actions are contrary to the national interest. It is also applied to those who used fraud to enter or remain in Brazil, or who entered the national territory in violation of the law, if they have not left within the prescribed time and their deportation is not desirable, and to those who are engaged in vagrancy or begging or disregard the prohibition established expressly in the Law Governing Foreigners (Article 66 of Law No. 6,815/80, as amended by Law No. 6,965 of December 1981)" (ibid.).

[128] See the examples given in the Preliminary report on the expulsion of aliens, by Maurice Kamto, Special Rapporteur, document A/CN.4/554, 4 April 2005, para. 4, note 6, and para. 27, note 34.

[129] For example, the expulsion, between June and September 1999, of 60,000 Haitians from the Dominican Republic; see progress report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere, op. cit., sect. II (a), para. 9.

[130] In his second report, the Special Rapporteur indicated that the French Minister of the Interior and Regional Development had set a goal of removing a minimum of 23,000 aliens in 2005 and noted that 12,849 aliens had been expelled in eight months (A/CN.4/573, para. 20), that on 17 February 2005, the Netherlands parliament had approved by a large majority the Government's decision to expel 26,000 foreigners whose status was irregular, and that Belgium had expelled 14,110 people in 2003 (ibid., para. 22). These figures raise the question of whether such mass expulsions were consistent with article 4 of Protocol No. 4 to the European Convention on Human Rights and with the case law of the European Commission of Human Rights and the European Court of Human Rights cited above. Even assuming that each of the persons concerned was individually expelled, is this not collective expulsion in disguise? For it is doubtful that every single case was given the benefit of a fair and objective examination, as required by the above-mentioned case law.

[131] See Darut, op. cit., p. 37, note 1.

117. In France, the National Convention, which came into power soon after the 1789 revolution and found itself at war with all the European nations except Switzerland, Sweden and Denmark, sought to guarantee domestic security in the midst of agitation by a "foreign faction" supported by "outside enemies". Thus, immediately after the outbreak of hostilities, it decided, by decree of 1 August 1793, to arrest all foreigners from countries at war with the Republic who had been residing in France prior to 14 July 1789. The law of 11 July 1795 (23 Messidor, Year III) decreed the expulsion of all aliens who were nationals of enemy Powers and the arrest of those who did not obey the expulsion order or whose itinerary differed from that indicated in the passports issued to them (art. 4). In addition, a law of 2 August 1795 (15 Thermidor, Year III) declared that the treatment of aliens was too lenient, and thus that "any foreigner who does not comply with the articles of the said law shall be prosecuted and punished for espionage", which, at the time, meant sentenced to death. These could be called "laws of anger" — attributable to "the state of anxiety of a government that had banished moderation from its agenda"[132] — as they were contrary to the humanitarian principles championed by the National Convention.

118. The tendency towards collective expulsion of nationals of enemy countries in time of armed conflict diminished in the following century. As Darut wrote:

> In the nineteenth century, most States which had known the horrors of war, while not overlooking their domestic security requirements, were, to the extent possible, less rigorous about expelling all nationals of the enemy State from their territory.[133]

119. Thus, in 1854, during the Crimean War, Russia decreed that French and English nationals present in Russian territory could continue to reside there, just as they had before the war, and guaranteed them the same security of person and property they had previously enjoyed, provided that they continued to obey the law and carry on their business peacefully.[134] In that same vein, on 4 May 1859, during the war with Italy, the French Government authorized Austrians residing in France to remain there as long as their conduct 'did not give rise to any cause for complaint".[135] On 21 May 1870, a similar statement was issued in the French *Moniteur Officiel*[136] with regard to the Germans. And in 1894, during the Sino-Japanese War, the Japanese Government allowed Chinese nationals residing in Japan to remain there during the period of hostilities, leading their lives as they had in the past; China followed the example of its enemy.[137] Similarly, in 1897, during the war between Greece and the Ottoman Empire over the independence of Crete, the Greek Government did not impose any expulsion measures on the Turks settled in Greece, recognizing their right to continue to live in Greece as long as their conduct did not give rise to complaints; however, Turkey did not have the same attitude: in declaring war, it notified the Greek Government, on 18 April 1897, of an *irade* of the Sultan decreeing expulsion, within 15 days, of all Greeks residing throughout the Ottoman

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[132] See Darut, op. cit., p. 40; and Martini, op. cit., pp. 88-89.

[133] Ibid.

[134] See Darut, op. cit., p. 43; and Martini, op. cit., p. 89.

[135] See Martini, op. cit., p. 88.

[136] Darut, op. cit., p. 43; and Martini, op. cit., p. 89.

[137] On these cases relating to the Sino-Japanese conflict in the nineteenth century, see the information provided by N. Politis in *Revue générale de droit international public*, 1897, p. 525 ff.; see also Martini, op.cit., p. 92.

territory.[138] It should also be noted that during the Transvaal War, from 1899 to 1902, English residents of Transvaal and in Orange Free State were expelled within 48 hours.[139]

120. Do these examples, particularly the attitude of the Turkish Government, imply, however, that the prevailing tendency in State practice at the time was being called into question? Martini writes that:

> Turkey's failure to uphold the law of nations, in 1897, drew protests from the embassies of the major Powers.[140]

121. No one knows whether, in this particular case, the rule in question was the prohibition of collective expulsion, or reciprocity in refraining from the collective expulsion of the nationals of a State at war with the host State for, in this instance, it would seem that Greece honoured that principle but Turkey did not. In any case, it should be noted that during a period where the collective expulsion of aliens who were nationals of a country with which the host country was at war was the order of the day, particularly in France, there was an outcry against a measure perceived as "taking revenge on innocent persons who could not be faulted on any grounds other than being vaguely suspected of spying".[141]

122. One should also take into account that during the Russo-Japanese War, fought in 1904 and 1905 — thus later than all the others mentioned above — Japan accorded the Chinese the same treatment it had during the war of 1894, and, on 10 February 1904, the Japanese Minister of the Interior instructed the authorities in charge of the territorial administrative units to refrain from showing hostility towards Russians, who were authorized to continue residing in the territory of the Empire, and to enter and leave it at will. As for Russia, by order of 14 and 27 February 1904, it, too, allowed the Japanese to continue living there peacefully, under the protection of the law, and to carry on their activities in Russian territory, "with the exception, however, of the Far East territories".[142]

123. It should be noted, however, that even as this tolerance was being practised by States, the quasi-unanimous literature of the day regarded the collective expulsion of foreign nationals of an enemy State as justified and consistent with the law of nations. As Martini wrote:

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[138] See Darut, op.cit., pp. 44-45; and Martini, op.cit., p. 93. Greeks who did not wish to be expelled could remain in Turkey, provided that they permanently gave up their Greek nationality and became Turkish.

[139] See Martini, op.cit., p. 94. The author believes, with regard to this case, that it "would be ill-advised to put this small country — which no longer exists and fought so heroically that it even won the admiration of its adversaries — on trial". Despagnet defended the conduct of the Boërs in this war in *Revue générale de droit international public*, 1900, p. 698.

[140] Martini, op. cit., p. 93.

[141] Fiore, *Nouveau droit international public*, 2nd ed. (translated from Italian by Antoine), vol. 3, No. 12, cited by Martini, op.cit., p. 90, footnote 1.

[142] On the Russo-Japanese War, see, in particular, Francis Rey, *La guerre russo-japonaise au point de vue du droit international* (Paris, Pedone, 1907), pp. 230-232; Henry Bonfils and Paul Fauchille, *Manuel de droit international public*, 5th ed. (Paris, Rousseau, 1908), No. 1055; and Martini, op.cit., pp. 92-93.

> The vast majority of authors on public international law have no difficulty in recognizing the mass expulsion of aliens belonging to an enemy nation as a natural effect of the declaration of war.[143]

It was, in fact, at this time that, in the same vein as Pillet and Niboyet, whose expertise was, admittedly, more in the area of private international law, two eminent internationalists, Bonfils and Fauchille, taught that:

> Mass expulsion, in time of war, is an act of defence and a perfectly lawful and unquestionably appropriate measure. Steps to avoid the risk of aliens staying in the country, prevent the provocations and unrest among the population that their presence could incite and thwart the possibility of dangerous and easily managed espionage, are obviously security measures that a State must be able to take ... Each State should be allowed to carry out mass expulsions of nationals of an enemy country, even if they are legitimately settled in the territory ... .[144]

Agreeing wholeheartedly, Pillet declared in 1891-1892, in a series of lectures on the law of war that he delivered to officers in Grenoble, that a State that offers hospitality "to a considerable number of aliens"[145] is acting "in accordance with a genuine need by expelling these aliens if it goes to war against their homeland. Their mere presence is a grave danger in and of itself".[146]

124. British legal theorists also took a clear-cut position on this matter, as the Special Rapporteur indicated in his second report (A/CN.4/573, para. 112).

125. The world has recently witnessed the practice of collective expulsion of nationals of an enemy State in the 1998 war between Ethiopia and Eritrea. As also indicated in the second report (A/CN.4/573, para. 114), the Eritrea-Ethiopia Claims Commission, citing *Oppenheim's International Law*, noted that international humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. The Commission's decision, which could not be appealed, was as follows:

> Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law.[147]

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[143] Martini, op. cit., p. 37.

[144] Bonfils and Fauchille, op. cit., No. 1055. In this connection, see Bry, *Précis élémentaire de droit international public*, 5th ed. (Paris, L. Larose et L. Tenin, 1906), p. 515, No. 381; Robert Piédelièvre, *Précis de droit international public*, vol. 2 (Paris, Pichon, 1894-1895), No. 830; John Basset Moore, *A Digest of International Law*, vol. IV (Washington, D.C., Government Printing Office, 1906), p. 68; and Alexandre G. Mérignhac, *Les lois et coutumes de la guerre sur terre d'après le droit international moderne et la codification de la Conférence de la Haye de 1899* (Paris, A. Chevalier-Marescq, 1903), No. 25.

[145] Here the author makes an exception. In his view, it would be different if a very small number of foreigners were involved: "A State that has only a negligible number of foreigners would do well to refrain from subjecting them to an expulsion that cannot be justified on any grounds. And as it is not at any risk, the State should not even flaunt its generosity ..." See Antoine Pillet, *Le droit de la guerre. Première partie — Les hostilités: Conférences faites aux officiers de garnison de Grenoble pendant l'année 1891-1892* (Paris, Arthur Rousseau, 1892), p. 99.

[146] Ibid., pp. 99-100.

[147] See decision of 17 December 2004 of the Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, Partial Award — Civilian Claims. Eritrea's Claims 15, 16, 23 and 27-32 (The Hague, 17 December 2004), para. 82.

126. It should be noted that this "rule" has no clear support in customary international law. Contrary to the view that cites, with unjustified assurance, "the customary right of a State to expel all enemy aliens at the outset of a conflict",[148] it is evident that the practice in the matter is rather different. Nor is there any basis for this thinking, whatever may have been implied, in international humanitarian law. Quite the reverse, the relevant provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949,[149] tend to support the opposite meaning.

127. In the first place, the first paragraph of article 27 at the beginning of section I (part III), entitled "Provisions common to the territories of the parties to the conflict and to occupied territories", reads as follows:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Alien civilians are considered protected persons under this Convention.

128. Secondly, in section II, entitled "Aliens in the territory of a party to the conflict", article 38 provides as follows: "the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace". Article 40 further stipulates that, if the protected persons "are of enemy nationality, they may only be compelled" to do certain types of work — specified in the article — which are not directly related to the conduct of military operations. Since they can be compelled to work "only to the same extent" as nationals of the party to the conflict in whose territory they are located, like all other protected persons, they "shall have the benefit of the same working conditions and of the same safeguards as national workers".

129. These provisions imply that the legal regime governing civilian persons protected in time of war should be applied generally and without distinction to national and foreign civilians alike, even if the latter are nationals of an enemy State or of a third party to the armed conflict. Thus, in analysing the provisions of article 41, relating to assigned residence or internment, one author wrote that "the fact of being of enemy nationality is not a valid criterion on which to justify internment".[150]

130. It is also significant that the monumental research work on customary international humanitarian law[151] carried out under the auspices of the International Committee of the Red Cross (ICRC) does not contain a single rule, among the 161 rules identified, on the collective expulsion of foreign nationals of an enemy State in

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[148] The Eritrea-Ethiopia Claims Commission, in footnote 27 (para. 81) of the Partial Award of 17 December 2004 (see preceding footnote), refers on this point to Gerald Draper, The Red Cross Conventions, pp. 36-37 (1958), quoted in *10 Digest of International Law*, p. 274 (Marjorie Whiteman, ed., 1968).

[149] United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

[150] See Oji Umozurike, "Protection des victimes des conflits armés", in *Les dimensions internationales du droit humanitaire*, Pedone/Institut Henry-Dunant/UNESCO, 1986, p. 224.

[151] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Droit international humanitaire coutumier. Volume I: Règles générales*, Bruylant/CICR, 2006.

time of war. At most, one rule (rule 103) can be found, stipulating that "[c]ollective punishments are prohibited". Assimilating, *quod non*, expulsion to a "punishment", or more precisely to a sanction, one can infer from this provision a rule prohibiting the collective expulsion of the type of aliens being considered here.

131. Of course, the distinction between expulsion in time of peace and expulsion in time of war seems to be well founded and, in any case, established in both theory and practice, as the authors of *Oppenheim's International Law* assert. But these authors refer more specifically to a State's right "to expel all hostile nationals residing, or temporary staying, within its territory".[152] It is difficult to say whether the Eritrea-Ethiopia Claims Commission let itself be influenced by this consideration. This idea, however, fits in well with the condition attached — in the aforementioned historical State practice with regard to the collective expulsion of foreign nationals of an enemy State — to the measure or declaration of non-expulsion, namely, that the foreign nationals in question could continue to reside in the State at war with their country and enjoy the necessary protection, provided that they lived there peaceably and did not give rise to any cause for complaint.

132. Given the entrenched positions and qualified formulations described above, one lesson could be drawn from this debate, which has been going on at least since the eighteenth century: that the matter should be tackled prudently, in the light of the progressive development of international law and its main contemporary principles. A number of questions may be raised. Which should prevail: the interest of the State or that of individual persons, even if they are nationals of an enemy State? The collective security interest of the belligerent State or the individual but nonetheless fundamental interest of the alien who is the presumed "enemy" of that State? Is it possible to reconcile these two apparently opposite requirements?

133. These are the questions that must now be answered, given the Special Rapporteur's belief that the right to expel nationals of an enemy State can be examined today only in the light of the progressive development of international law and the fundamental principles of human rights. In fact, the philosophy of human rights and contemporary international law do not allow a State to collectively subject a group of aliens *as such*, whatever its nature and even if it is composed of nationals of an enemy State, to the regrettable consequences of a situation for which they are not responsible, on the sole grounds that they are nationals of that State. Expulsion cannot be used as a preventive weapon against an enemy State or as a means of retaliation against peaceful aliens for a war in which they are not involved and for which they may have no sympathy.

134. In brief, it appears that: (a) there is no rule of international law that requires a belligerent State to allow nationals of an enemy State to remain in its territory,[153] but there is also no rule that requires such State to expel them; (b) the collective expulsion of foreign nationals of an enemy State is practised by some States, to varying degrees, and finds support in most of the literature, both historically and in modern times; (c) this State practice and the literature seem to consider that such expulsion must be allowed only in the case of aliens who are hostile to a receiving State at war with their country. It follows, *a contrario*, that foreign nationals of an

[152] See *Oppenheim's International Law*, op. cit., para. 513, pp. 940-941.

[153] See Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge, Cambridge University Press, 1966), p. 76.

enemy State who are living peaceably in the host State and causing no trouble to that State may not be collectively expelled; their expulsion must obey the ordinary law on expulsion in time of peace, for the lack of hostility on their part removes them from the exceptional situation created by the war with the State of which they are nationals. In this case, it is difficult to agree fully with the view that "a State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example ... during a state of war".[154] Such a position appears unacceptable, in view of the requirement of respect for the individual rights of the human person in all circumstances, unless the aliens in question, taken together as a group, carry out activities or display behaviours which are hostile or dangerous to the receiving State.

135. In the light of the foregoing, the following draft article is proposed:

Draft article 7
Prohibition of collective expulsion

1. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

2. Collective expulsion means an act or behaviour by which a State compels a group of aliens to leave its territory.

3. Foreign nationals of a State engaged in armed conflict shall not be subject to measures of collective expulsion unless, taken together as a group, they have demonstrated hostility towards the receiving State.

[154] Karl Doehring, "Aliens, Expulsion and Deportation", *Encyclopedia of Public International Law*, 1985, vol. 8, p. 16.

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Responsibility of international organizations

Comments and observations received from international organizations

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I. Introduction

1. At its fifty-fifth session, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003, 2004, 2005 and 2006 reports.[2] Most recently, the Commission sought comments on chapter VII of its 2006 report[3] and on the issues of particular interest to it noted in paragraphs 27 and 28 of that report.[4]

2. As at 30 April 2007, written comments had been received from the following three international organizations (dates of submission in parentheses): European Commission (18 December 2006); International Monetary Fund (12 March 2007); Organization for the Prohibition of Chemical Weapons (8 January 2007). Those comments are reproduced in section II below, in a topic-by-topic manner. Additional submissions received will be reproduced as addenda to the present report.

II. Comments and observations received from international organizations

A. General remarks

European Commission

The European Commission largely supports draft articles 17 to 24 on circumstances precluding wrongfulness, but it has some concerns as regards certain details of the new draft articles 28 and 29 in the chapter on responsibility of a State in connection with the acts of international organizations. The European

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.

[2] The written comments of international organizations received prior to 12 May 2006 are contained in documents A/CN.4/545, A/CN.4/556 and A/CN.4/568 and Add.1.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10).

[4] Paragraphs 27 and 28 of the 2006 report read as follows:

"27. The Commission would welcome comments and observations from Governments and international organizations on draft articles 17 to 30, in particular on those relating to responsibility in case of provision of competence to an international organization (draft article 28) and to responsibility of a State member of an international organization for the internationally wrongful act of that organization (draft article 29).

"28. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be addressed in the next report:

"(a) Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?

"(b) According to article 41, paragraph 1, on Responsibility of States for internationally wrongful acts, when a State commits a serious breach of an obligation under a peremptory norm of general international law, the other States are under an obligation to cooperate to bring the breach to an end through lawful means. Should an international organization commit a similar breach, are States and also other international organizations under an obligation to cooperate to bring the breach to an end?"

Commission hopes that the International Law Commission will take good note of these concerns.

International Monetary Fund

Before addressing the specific articles, the International Monetary Fund (IMF) would like to reiterate some of the general points that it made on earlier occasions regarding the Commission's approach to this topic.

First, IMF does not believe that it is appropriate to rely on the rules applicable to State responsibility when analysing the international responsibility of international organizations. As has been recognized by the International Court of Justice, international organizations, unlike States, do not possess general competence. An international organization is established by the agreement of its membership for the specific purposes set out in its constituent agreement. Unless that agreement itself is inconsistent with international law (in which case the wrongfulness of the agreement should be attributed to the member States rather than to the organization), the responsibility of the organization should be assessed by reference to whether it has acted in accordance with that agreement, i.e., whether it has acted ultra vires. In addition, and consistent with the above, while States are organizationally and functionally similar to each other, the powers and functions of international organizations will vary, depending on the terms of their charters. These distinctions must be taken into consideration when assessing the international responsibility arising from acts of different organizations.

Secondly, when an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a "peremptory norm" (jus cogens) or arises from a specific obligation that has been incurred by the organization in the course of its activities (e.g. by entering into a separate treaty with another subject of international law). However, vis-à-vis all other norms of international law, both the charter and the internal rules of the organization would be lex specialis as far as the organization's responsibility is concerned and, accordingly, cannot be overridden by lex generalis, which would include the provisions of the draft articles.

Finally, IMF continues to be uncertain as to the basis for the proposed norms that are being developed. It recognizes that article I of the Commission's statute provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". The Commission has not indicated whether the draft provisions under consideration represent a codification of existing principles, or alternatively, are intended for the progressive development of the law. If the former provides the basis for the current work, it would be helpful if the Commission identified the practice that is being codified in each instance. If, however, the latter approach is being followed, the International Monetary Fund thinks it important that the study elaborate on the policy bases for the recommendations.

IMF recognizes that these points have been made by the Fund on earlier occasions. Nevertheless, from its review of the Commission's responses to the comments it made on earlier occasions, it appears the Commission has not yet responded to these general — and fundamental — issues. The International Monetary Fund would be very grateful if it could do so.

Before commenting on draft articles 17 to 30, IMF takes this opportunity to comment on certain previously adopted draft articles, in the expectation that these comments will be considered in future readings of these draft articles by the Commission. Moreover, the comments on these previous draft articles would also be relevant to draft articles 25 to 30, on which comments have now been sought.

Organization for the Prohibition of Chemical Weapons

The draft articles under consideration could be roughly divided into two groups: (a) adaptations of the articles on responsibility of States for internationally wrongful acts (draft articles 17-27 and 30); and (b) articles that are unique to the present draft (draft articles 28-29). The comments below are arranged accordingly.

For the most part, the text of draft articles 17 to 27 and 30 differs from that of the respective International Law Commission articles on responsibility of States for internationally wrongful acts insofar as the term "State" is replaced with the term "international organization" (or "organization") since, as far as the above articles are concerned, the position of international organizations does not significantly differ from that of States. Sometimes other adjustments are made, which do not raise any apparent difficulties, and a great deal of case law is quoted in support of the draft provisions.[5] Where there is no or little State practice cited, there does not appear, in the view of the Organization for the Prohibition of Chemical Weapons, to be any controversy regarding the subject matter of a given draft article.[6]

As it has already been mentioned before, articles 28 and 29 are unique to the draft articles on responsibility of international organizations for internationally wrongful acts, which would largely explain the vagueness, at times bordering on elusiveness. Of course, it is very likely that the ambiguity is intentional but it certainly should not result in incomprehensibility. Inclusiveness should not come at the expense of clarity.

B. Draft article 3 — General principles[7]

International Monetary Fund

Paragraphs 8 to 10 of the Special Rapporteur's third report suggest that conduct mandated by the lawful exercise of an organization's decision-making process could give rise to a breach of the organization's obligations.[8] This suggestion is based on the Special Rapporteur's view that "difficulties with compliance due to the political decision-making process are not the prerogative of international organizations".[9]

IMF cannot agree. The decision-making processes of international organizations are legal imperatives in their own right; they are typically established in the organizations' charters. Whatever politics may be involved in reaching particular

[5] [Footnote omitted].

[6] [Footnote omitted].

[7] See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 53.

[8] See, for example, document A/CN.4/545, at pp. 6-7, for some of our concerns in this regard.

[9] Third report on responsibility of international organizations by the Special Rapporteur, A/CN.4/553*, at p. 4.

decisions, compliance with the decision-making process is not a political choice. Unlike a State, an international organization is not sovereign in this regard; it is an instrument of its charter.

The Special Rapporteur's reliance upon United Nations activities in Rwanda and Srebrenica appear misplaced. For example, the cited report on Rwanda seems to address the "responsibility" of the United Nations in a moral sense only. Nowhere in that report is there any suggestion that the United Nations had legal responsibility under international law. Moreover, these examples highlight the reservations previously expressed by IMF, i.e., that the Commission should not attempt to use practice from peacekeeping or use of force to develop principles that would apply to other activities of international organizations, such as developmental and financial activities.[10]

IMF wishes to emphasize again that the fundamental parameters within which all of an international organization's obligations must be contained are established in the constituent agreement of the organization, since the outer limits of what the members have agreed to are set out in that charter. International organizations are limited in their capacity and their obligations are inherently limited by the same capacity — those capacity limitations are established by the organization's charter. This issue is also discussed in a paper presented by the former General Counsel of IMF to the United Nations Committee on Economic, Social and Cultural Rights in 2001, and IMF invites the Commission's particular attention to this paper.[11]

C. Draft article 8 — Existence of a breach of an international obligation[12]

International Monetary Fund

The International Monetary Fund has two comments on this draft article.

First, critical issues arise from the relationship between (i) the treatment in the draft articles of the breach of an international obligation by an international organization and (ii) the treatment of the same act under the rules of the organization.

The commentary to the draft articles asserts, in this regard, that the rules of an organization "do not necessarily prevail over principles set out in the present draft [articles]."[13] IMF sees no legal basis for this assertion. Nothing in these draft articles suggests that they contain peremptory norms or even principles that are now part of general or customary international law.

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[10] See, for example, A/CN.4/545, at pp. 7 and 17, for some of prior comments of the International Monetary Fund in this regard.

[11] François Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund", E/C.12/2001/WP.5 (7 May 2001) (discussing the extent to which provisions of the International Covenant on Economic, Social and Cultural Rights have legal effect on IMF, the extent to which IMF is obligated to contribute to the achievement of the objectives of the covenant and the extent to which IMF may contribute to these objectives under its Articles of Agreement).

[12] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

[13] Ibid., para. 206, commentary to draft article 8, para. (7).

To the extent the Commission seeks to contribute to the progressive development of international law, it is difficult to see how the quoted assertion achieves this aim. The report itself demonstrates considerable divergence of views on this question among members of the Commission, and the assertion would only create uncertainty, where there currently is none, among organizations as to the content and applicability of rules governing their actions. As noted above, and in its comments of 1 April 2005, IMF is of the opinion that a far better view is that the rules of an organization are not just part of international law, but are lex specialis under international law in determining the obligations of the international organization. Moreover, international agreements between an organization's members, and other rules of the organization address the exclusive application of the laws governing their relations. Clearly, then, the general principles contained in the draft articles (as lex generalis, to the extent they reflect obligations binding on all international organizations), would not prevail over the rules of the organization, as lex specialis.

For the above-mentioned reasons, IMF reiterates its general comment that the issue of whether there is a breach of an international obligation by an international organization can only be determined by reference to the rules of the organization (save in exceptional cases involving peremptory norms of general international law).

Secondly, and without prejudice to the foregoing, it would be useful to clarify why paragraph 2 of draft article 8 is needed. The commentary states that paragraph 2 "intends to say that, to the extent that an obligation arising from the rules of the organization has to be regarded as an obligation under international law, the principles expressed in the present draft apply".[14] However, by its language, paragraph 1 of draft article 8 is sufficient, since it applies to international obligations regardless of their origin and character. Therefore, to the extent an obligation arising from the rules of an organization has to be regarded as an obligation under international law, it would already be covered by paragraph 1 of draft article 8. If this is correct, paragraph 2 of draft article 8 can be deleted, as it adds little. Issues associated with the application of draft article 8 to the rules of the organization can be sufficiently addressed in the commentary to the draft articles.

D. Draft article 11 — Breach consisting of a composite act[15]

International Monetary Fund

Draft article 15 of the articles on State responsibility, on which article 11 is based, deals with composite acts. These are "acts ... which concern some aggregate of conduct and not individual acts as such" and which "give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct".[16]

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[14] Ibid., para. (6).

[15] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

[16] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 15, para. (1).

Given the limited capacity of international organizations, it is not readily evident that all international organizations would be subject to obligations that could be breached by composite acts. It would therefore be useful if the Commission could provide examples of specific composite acts and related obligations contemplated with regard to international organizations.

E. Responsibility of an international organization in connection with the act of a State or another international organization — General considerations

International Monetary Fund

The International Monetary Fund is unable to concur with the assumptions underlying this chapter of the draft articles. These assumptions are encapsulated in the following statement drawn from the commentary to the draft articles:

> "For the purposes of international responsibility, there would be no reason for distinguishing the case of an international organization aiding or assisting a State or another international organization from that of a State aiding or assisting another State."[17]

First, in its comments of 1 April 2005, IMF had outlined its reasons for the view that an international organization's role in conduct by a State or another organization is inherently different from one State's role in the conduct of another State.[18] As explained in the preceding general comments, States and international organizations are fundamentally different in this respect. IMF again draws the Commission's attention to these general observations and to those set out in paragraphs 13 to 17 of our comments of 1 April 2005.[19]

Secondly, as explained in the Fund's general comments above, the effects of and responsibility for an international organization's role in conduct by a member State are both generally and exclusively governed by the rules of each international organization. The relevant rules applicable to each international organization are varied in substance. To the extent an attempt is being made to progressively develop general principles in this area, this should primarily be based on the specific rules of the various international organizations, before relying on provisions that were drawn up from, and were intended to apply exclusively to, relations between States.

Thirdly, the principle that lex specialis prevails over lex generalis would also apply to such general principles. Therefore, the specific rules of an organization governing relations with member States would prevail over any general principles

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[17] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, commentary to draft chapter IV, para. (1).

[18] A/CN.4/556, at pp. 45-46.

[19] Ibid., Among other things, IMF noted in those comments that States and international organizations seldom have identical or even similar obligations. Thus, the situations envisaged in draft articles 12, 13 and 15 will seldom, if ever, arise. By way of example, the respective obligations of IMF and of States Members of the United Nations as regards decisions of the Security Council under Chapter VII of the Charter of the United Nations are very different. While Member States are obliged to carry out such decisions under the Charter, the United Nations has recognized and agreed with IMF that the Fund's only obligation is to "have due regard for" such decisions, as discussed [under V. below].

on the responsibility of international organizations for aid or assistance provided to States generally.

Finally, it is useful to note that the statement that there would be "no reason" for distinguishing such cases appears to be contradicted by the Commission's admission later in the commentary, i.e., that the consequences of the ability of international organizations to influence State conduct through non-binding acts "does not have a parallel in the relations between States".[20]

F. Draft article 12 — Aid or assistance in the commission of an internationally wrongful act[21]

International Monetary Fund

For the reasons stated in the above paragraphs, the International Monetary Fund is unable to concur with the proposition that the application of article 16 of the draft articles on State responsibility to international organizations "is not problematic", and it cannot agree with the blanket application of article 16 of the draft articles on State responsibility to international organizations.[22]

In addition, it should be emphasized, in line with the commentary to article 16 of the draft articles on State responsibility, that "aid or assistance" as used in those draft articles entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question.[23] Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. This should be distinguished from the aid and assistance, as those words are used colloquially, which international organizations regularly provide their members.

For example, IMF was established, inter alia, to provide financial assistance t its members to assist in addressing their balance of payments problems. Consistent with its charter, IMF regularly provides such financial assistance.

That said, a member receiving financial assistance from IMF may still engage in wrongful conduct. Neither IMF itself, nor the provision of financial assistance by IMF, is capable of precluding such conduct or contributing significantly to it. First, IMF cannot preclude such conduct because, as explained in its comments to draft article 14 below, a member always has an effective choice not to follow the conditions on which IMF assistance is provided. Secondly, IMF cannot contribute significantly to such conduct because IMF financing is not targeted to particular conduct; it is provided to support a member's economic programme that addresses its balance of payments problems. The financial resources utilized by the member to engage in particular conduct can be, and typically are, obtained from a variety of sources — domestic taxpayers, domestic and international creditors and international donors. The fungible character of financial resources also means that

[20] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, commentary to draft chapter IV, para. (3).

[21] Ibid., para. 205.

[22] Ibid., para. 206, commentary to draft article 12.

[23] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 16, para. (5).

IMF financial assistance can never be essential, or contribute significantly, to particular wrongful conduct of a member State, for purposes of this draft article 12.[24]

G. Draft article 13 — Direction and control exercised over the commission of an internationally wrongful act[25]

International Monetary Fund

While recognizing the relevance to international organizations of the principle in article 17 of the draft articles on State responsibility, the International Monetary Fund has great difficulty with the broad expansion of that principle found in the commentary to the present draft article 13. The adoption of a decision by an international organization that is legally binding upon its member States is not the same as direction or control by the organization, any more than the invocation of a binding contractual commitment would as a general matter constitute direction or control over a contractual counterparty. The international organization's decision is legally binding only because of the bound State's prior consent to the legal regime under the organization's charter. This circumstance simply cannot be equated to direction and control of a dependent State by a dominant State. This principle of direction and control would therefore clearly not apply to organizations, such as international financial institutions, that are incapable of the threat or use of force. This issue is further explained in the Fund's comments on draft article 15 below, and the Commission's attention is drawn to those comments as well.

H. Draft article 14 — Coercion of a State or another international organization[26]

International Monetary Fund

Again, one is compelled to take exception to the expansion of a principle on State responsibility in the commentary to draft article 14. A binding decision of an international organization cannot constitute coercion, which is defined in the commentary to article 18 on State responsibility as "[n]othing less than conduct which forces the will [giving] no effective choice but to comply".[27] Because of member States' acceptance of and participation in the decision-making processes, IMF does not see how the Commission could conclude that binding decisions of an international organization could be equated with coercion in the above sense. This issue is further explained in the Fund's comments on draft article 15, and the Commission's attention is drawn to those comments.

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[24] The Special Rapporteur also acknowledges this view in his third report (A/CN.4/553*) by reference on p. 11, at note 35, to the article by Ibrahim Shihata, "Human Rights, Development and International Financial Institutions", *American University Journal of International Law and Policy*, vol. 8 (1992-1993), p. 27.

[25] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

[26] Ibid.

[27] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 18, para. (2).

Furthermore, IMF disagrees with the suggestion, in the Special Rapporteur's third report, at paragraph 28, that an international financial institution's conditions for providing financial assistance to a member State could ever constitute coercion. The Special Rapporteur's reference to the reported filing of a lawsuit against IMF in Romania is inapposite; that failed attempt to bring a case against IMF stands for nothing in the law and only reminds one of the perennial creativity of plaintiff lawyers. IMF welcomes the Commission's omission of that discussion from its own report, but nevertheless takes this opportunity to emphasize that a member State always has an effective choice between following the conditions of IMF financing, having recourse to other sources of external financing, or not accepting any external financing.

Two points are worth highlighting in this regard. First, as has been explained in various publications, including the rules of the Fund, the provision of IMF financing does not entail the establishment of contractual relations between IMF and the member obtaining financial assistance.[28] Therefore, a member's inability to or desire not to comply with a condition for the provision of such financing does not result in a breach of obligation by the member. Secondly, while IMF is fully responsible to its membership for the establishment and monitoring of conditions attached to the use of its resources, in responding to members' requests to use these resources and in setting these conditions, IMF is "guided by the principle that the member has primary responsibility for the selection, design and implementation of its economic and financial policies".[29]

I. Draft article 15 — Decisions, recommendations and authorizations addressed to member States and international organizations[30]

International Monetary Fund

The International Monetary Fund wishes to echo and endorse the concerns and reservations that were expressed by Interpol and the World Health Organization and reproduced in the report of the Special Rapporteur, regarding draft article 15, which purports to hold an international organization responsible for an act by a member State or another international organization, committed not with the aid or assistance, direction or control of the first organization, but merely in reliance upon a binding or non-binding decision, authorization or recommendation of that organization.[31]

Furthermore, for the reasons set out below, IMF believes this draft article should be deleted in its entirety.

As stated in paragraph 17 of its comments of 1 April 2005, this draft article appears to be based on a contradiction manifesting a fundamental misconception of

[28] See, for example, IMF Guidelines on Conditionality, Decision No. 12864-02/1020, 25 September 2002, para. 9, available at http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12864-(02/102). See also Joseph Gold, Financial Assistance by the International Monetary Fund: Law and Practice, *IMF Pamphlet Series*, No. 27 (1980) pp. 17-19.

[29] IMF Guidelines on Conditionality, Decision No. 12864-02/1020, 25 September 2002, para. 3, available at http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12864-(02/102).

[30] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 205.

[31] See A/CN.4/568 [at pp. 5-6].

an international organization's capacity to act inconsistently with its international obligations.

When conduct is "authorized" under the rules of an international organization, the fact that the organization can lawfully "authorize" that conduct necessarily implies that the conduct is not a violation of the organization's charter. If the conduct does not violate the organization's charter, the only question that remains is whether the conduct is consistent with the organization's other international obligations. Because an international organization is created by, and therefore primarily subject to, its charter, the international organization's other obligations are required to be consistent with the charter. It follows, as indicated in the general comments above, that this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

The contradiction contained in this draft article 15 is also manifest in the commentary to the draft article. For instance, the commentary states that since compliance with an international organization's binding decisions is to be expected, it appears preferable to hold the organization responsible even before any act implementing such decisions has been committed.[32] This proposition suggests that the act of taking a binding decision alone constitutes wrongful conduct, as this act gives rise to the breach of an obligation. Since the act of taking a binding decision must necessarily be consistent with the organization's charter, that act by itself cannot amount to wrongful conduct which gives rise to the breach of an obligation of that international organization. As such, this proposition is inconsistent with the fundamental principle that there must be conduct constituting a breach of an international obligation for responsibility to arise.[33]

IMF is also unable to agree with the assertion in the commentary to this draft article 15 that where a decision of an international organization allows "the member State or [other] international organization some discretion to take an alternative course which does not imply circumvention, responsibility would arise for the international organization that has taken the decision only if circumvention actually occurs. ..."[34]

States are independent actors. The mere recommendation or specification of a certain objective by an international organization, which a State (or other international organization) decides to then achieve in a manner of its own determination, cannot result in international responsibility for the organization that authorizes, recommends or specifies the objective. For the same reason, reliance on such authorization or recommendation cannot be a sufficient basis to attribute responsibility to the international organization.

As expressed in its comments of 1 April 2005, an international organization cannot be responsible for the manner in which its membership, or non-member States, or other international organizations, choose to implement, or not, the

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[32] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, commentary to draft article 15, para. (5).

[33] See draft article 2 of the draft articles on State responsibility (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10)), and draft article 3 of the present draft articles on the responsibility of international organizations.

[34] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, commentary to draft article 15, para. (7).

organization's decisions, authorizations or recommendations.[35] Likewise, Interpol had explained previously that action by a country pursuant to an authorization by or cooperation with an international organization does not engage the responsibility of the international organization merely by reason of such authorization or cooperation.[36]

The Special Rapporteur, in his third report, recognized that there are no clear examples in practice of an international organization being responsible for acts of its member States taken under a binding decision or an authorization of the organization where such acts would have been internationally wrongful if taken by the organization itself.[37]

In view of the above, the assertion, as in paragraph 8 of the commentary to draft article 15, that an organization's authorizations and recommendations are "susceptible of influencing the conduct of member States"[38] or others is insufficient to establish the responsibility of the international organization. Mere susceptibility to influence the conduct of another is not a recognized test for legal responsibility. If it were, there would be no need for the qualifications and limitations upon responsibility for aid or assistance, direction or control, or coercion of another, that are incorporated in articles 16, 17 and 18 on State responsibility, and their counterparts at draft articles 12, 13 and 14, and 25, 26 and 27 of the current project. Draft article 15 and its analog draft article 28, discussed below, potentially erase all of those qualifications and limitations. IMF sees no basis or rationale for the Commission to suggest that the inclusion of this provision represents either the codification or the progressive development of international law in this area.

J. Circumstances precluding wrongfulness — General considerations

European Commission

The draft articles 17 to 24 follow very closely the model of the relevant articles on State responsibility. In most cases this may be acceptable, but in others it is not.

The European Community recalls the diversity of the structures, forms and functions of international organizations and the fact that some of the concepts applying to States are not relevant in this context. This is most important for the European Union given the specific nature of the organization and in light of the direct applicability of European Community law to member States and its supremacy over national laws.

The European Community is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so.

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[35] A/CN.4/556, at p. 45.

[36] Ibid., at pp. 43-45.

[37] A/CN.4/553*, paras. 27-28.

[38] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, commentary to draft article 15, para. (8).

K. Draft article 17 — Consent[39]

European Commission

Draft article 17 is vitally important for many of the external relations activities of the European Community/European Union. When discussing draft article 17 on consent, the Special Rapporteur referred to invitations issued from States to the United Nations to verify their election processes. In addition to the Union civil crisis instruments, there is considerable European Community practice in the field. Under two regulations of 1999, the European Community provides support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process and by training observers. European Community election observation missions are usually led by a member of the European Parliament upon the invitation of the host Government. Article 17 is therefore of vital importance for the European Union's external relations activities, which could otherwise be seen as undue interference in the domestic affairs of third States.

International Monetary Fund

Regarding the issue of consent discussed in draft article 17, an important example that should be included by the Commission in its commentary to the draft articles is the consent that occurs upon a State's accession to an international organization's charter.

The charter of an international organization is agreed to by its members. For example, the very first sentence in the Fund's Articles of Agreement reads: "The Governments on whose behalf the present Agreement is signed agree as follows"[40] (emphasis added).

To the extent an organization's conduct is therefore consistent with its charter, such conduct has been agreed to by the organization's members. Therefore, conduct of an organization that is taken consistent with the organization's charter has the consent of the organization's members and the wrongfulness of such conduct would prima facie be precluded vis-à-vis those members.[41]

This is another reason, additional to those based upon lex specialis and advanced in IMF responses to the Commission in its general comments above and in its comments made in prior years, why conduct by an international organization that is authorized by its rules cannot be internationally wrongful conduct vis-à-vis the organization's membership.

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[39] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[40] The preamble to the Charter of the United Nations contains a similar statement, that is, "[a]ccordingly, our respective Governments ... have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations" (emphasis added).

[41] It may also be noted that the Fund's Articles of Agreement do not allow any qualifications or reservations to the obligations of membership.

The preceding observations should not be read to suggest that consent can only arise in the case of dealings between an organization and its member States. The principle of consent precluding the wrongfulness of an organization's conduct would also apply to relations with non-members, to the extent such consent is express or implied.

L. Draft article 18 — Self-defence[42]

European Commission

On draft article 18 on self-defence, there is a need for further discussions as to how self-defence would apply in relation to an international organization. Much of the discussion in the International Law Commission commentary is based on the use of self-defence in peacekeeping operations, but that right arose in many cases from the terms of the mandate given to a peacekeeping force. It is difficult to extrapolate from those specific mandates a wider right that would exist in different circumstances.

International Monetary Fund

This draft article highlights the Fund's preceding general comment on the differences between international organizations. As the Commission notes, the issues addressed in draft article 18 ("self-defence") would only be relevant to a small number of organizations, such as those administering territory or deploying an armed force. It is unclear why a provision of such limited relevance is proposed to be included in draft articles that purport a wider applicability, i.e., to all international organizations, not just those engaged in administering territory or deploying an armed force. In contrast, article 21 of the draft articles on State responsibility, on which the present article 18 is based, was relevant and applicable to all States.

M. Draft article 19 — Countermeasures[43]

International Monetary Fund

While recognizing the Commission's statement that the provision on countermeasures will be drafted at a later stage, IMF wishes to provide the following observations on the issue of countermeasures in the context of international organizations.

IMF is of the view that the wrongfulness of conduct by an international organization might also be precluded by the principle of countermeasures, i.e., because the conduct was undertaken to procure cessation of wrongful conduct against the organization. This view is based on the fact that in practice international treaties provide organizations with rights to undertake measures that are similar to countermeasures.

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[42] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[43] The text of this draft article will be drafted at a later stage, when the issues relating to countermeasures by an international organization are examined in the context of the implementation of the responsibility of an international organization (ibid.).

For example, under article V, section 5, of the Fund's Articles of Agreement, whenever IMF is of the opinion that a member is using the Fund's general resources in a manner contrary to the organization's purposes, upon issuing a report to the member setting forth those views and prescribing a suitable time for reply, IMF can limit the use of its general resources by such member. If no reply or an unsatisfactory reply is received, it may even declare the member ineligible to use the Fund's general resources. While such limitations on use of resources to which IMF members otherwise may have access involve the exercise of treaty-based rights by IMF, they are similar in effect to countermeasures that another organization might take to procure cessation of wrongful conduct against the organization.

N. Draft article 21 — Distress[44]

European Commission

The European Community would like the International Law Commission to give examples of when distress would apply to an international organization and if it would ever extend to an international organization performing its normal humanitarian functions in respect of persons entrusted to its care.

Organization for the Prohibition of Chemical Weapons

The commentary to the draft article quotes the commentary to article 24 on responsibility of States for internationally wrongful acts, particularly the example from practice of a British military ship entering Icelandic territorial waters to seek shelter during a heavy storm. This incident is described as follows: "the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care". This wording implies that but for distress, the act of a British warship entering the Icelandic territorial sea would have been considered internationally wrongful.

The incident in question occurred in December 1975, at which time perhaps not all maritime powers recognized the right of warships to innocent passage through the territorial sea of a coastal State. The situation has changed now and the right of warships to innocent passage is reflected in the provisions of the 1982 United Nations Convention on the Law of the Sea as well as in State practice.[45] Thus, today a similar act would not be internationally wrongful as, under the Convention,[46] it would [...] not be wrongful for reasons of force majeure or distress. Owing to developments in the international law of the sea and the current international recognition of the right of innocent passage for warships, the example given in the commentaries to the articles on responsibility of States for

[44] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[45] See especially the United States/Union of Soviet Socialist Republics Joint Statement on Innocent Passage, 1989, and the United Nations Secretary-General's annual reports on the law of the sea.

[46] Article 18(2) of the United Nations Convention on the Law of the Sea on the meaning of passage provides: "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

internationally wrongful acts may be somewhat outdated. Therefore, in order to avoid confusion, it might be specified that the position in general international law on this specific topic has changed.

O. Draft article 22 — Necessity[47]

European Commission

As regards draft article 22 on necessity, the Special Rapporteur reports that a majority of statements in the Sixth Committee had been in favour of including such an article among the circumstances precluding wrongfulness. However, some States Members of the European Union sounded a note of caution in this respect, citing the lack of relevant practice, the risk of abuse and the need to provide stricter conditions than those applying to States.

The European Commission would recommend further clarification of what is meant by "an essential interest" and when an international organization would have the "function to protect" that interest.

International Monetary Fund

The International Monetary Fund would like to supplement its earlier observations on the topic of necessity.

When it addressed necessity in its correspondence to the Commission on 1 April, 2005, IMF wondered whether international organizations could claim "essential interests" similar to those of States.[48] Following a very useful discussion of this issue with the Special Rapporteur and the then Chairman of the Drafting Committee, organized by the World Bank, IMF sees strong merit in the view that there could be interests essential to the purposes of an organization, which interests would allow an international organization to invoke the principle of necessity. Analogous principles, i.e., where a predominant interest overrides other stated purposes, are reflected in the rules of organizations.

For example, article VII, section 3, of the Fund's Articles of Agreement authorizes IMF to formally declare a member's currency scarce when it becomes evident that such scarcity "seriously threatens" the Fund's ability to supply such currency.[49] The declaration then operates as an authorization for IMF members, after consultation with IMF, to temporarily impose limitations on the freedom of exchange operations in the scarce currency. Absent the "serious threat" referred to in article VII, the effect of such a declaration would be at odds with the Fund's purpose of assisting in the elimination of exchange restrictions.

For the above reasons, IMF urges a broader construction of "essential interest" than is suggested by the Commission's commentary on draft article 22.

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[47] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[48] See A/CN.4/556, pp. 41-42.

[49] IMF has not to date had occasion to invoke article VII, section 3.

P. Responsibility of a State in connection with the act of an international organization — general considerations[50]

European Commission

On the one hand, for the reasons given by the Special Rapporteur, draft articles 25 to 27 and 30, which correspond to articles 16 to 18 of the draft articles on State responsibility, look to be acceptable. However, such direct borrowing from the draft articles on State responsibility deserves careful attention. On the other hand, the new draft articles 28 and 29 are without precedent and merit close scrutiny. It is on these articles that the special character of the European Community causes particular problems.

Q. Draft articles 25 and 26[51]

International Monetary Fund

The International Monetary Fund concurs with the view that mere participation by a member State in the decision-making process of an international organization could not constitute aid or assistance in, or direction or control over, the commission of an internationally wrongful act by the organization.[52]

However, as indicated in its comments on draft article 12, it should be emphasized in line with the commentary to article 16 of the draft articles on State responsibility, that "aid or assistance" entails knowingly and intentionally providing a facility or financing that is essential or contributed significantly to the wrongful conduct in question.[53] Given the fungible nature of financial assistance, such references in the case of financial assistance can only mean assistance that is earmarked for the wrongful conduct. The threshold of the aid or assistance being essential or contributing significantly to the act should be similarly included in draft article 25.

With regard to the suggestion, contained in the commentary to draft articles 25 and 26, of wrongfulness arising even in the case of conduct taken by the State within the framework of the organizations, IMF again draws the Commission's attention to the preceding general comments and to its comments on draft article 15. Specifically, when conduct is "authorized" under the rules of an international organization, the fact that the organization can lawfully "authorize" that conduct necessarily implies that the conduct is not a violation of the organization's charter. If the conduct does not violate the organization's charter, the only question that remains is whether the conduct is consistent with the organization's other obligations. As indicated above, this situation could only arise where the other obligation derives from a peremptory norm or a specific bilateral obligation entered into between the organization and another subject of international law.

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[50] The location of this section will be determined at a later stage.

[51] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[52] Ibid., commentary to draft articles 25 and 26.

[53] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 16.

R. Draft article 27 — Coercion of an international organization by a State[54]

International Monetary Fund

The International Monetary Fund similarly concurs with the view that mere participation by a member State in the decisions of an international organization could not constitute coercion.[55] As the term has been used by the Commission, coercion means nothing less than conduct which forces the will, giving no effective choice but to comply.[56] A member State cannot be said to have coerced an international organization through its participation in the decision-making process, including by its exercise of a range of prerogatives a member State may possess pursuant to provisions contained in the charters of international organizations, including its withdrawal from the organization.

Also, based on the commentary to the draft articles on State responsibility, IMF would note that serious financial pressure upon an international organization by a member State could only constitute coercion if it is such as to deprive the organization of any possibility of conforming with the obligation breached.[57]

This is not to say that there never could be situations of member States coercing international organizations, or vice versa, such as through the illegal use of force or illegal threat of force by one against another. But IMF cannot envisage any circumstance in which coercion could arise from those financial dealings between an international organization and member States which are contemplated under and carried out in accordance with the organization's charter and rules.

S. Draft article 28 — International responsibility in case of provision of competence to an international organization[58]

European Commission

Draft article 28 puts forward the new idea that a State member of an international organization may be held responsible for bestowing competence on it. Paragraph 1 requires that a State "circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation". Paragraph 2 explains that State responsibility is triggered in such a situation irrespective of the question whether the act is internationallly wrongful for the international organization itself. In other words, a State may be liable for the mere fact of transferring competence to an international organization,, even if the organization acts lawfully, if and insofar as the State thereby "circumvents one of its international obligations".

From the point of view of the European Community/European Union, this approach is difficult to understand. Would member States face responsibility

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[54] Ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[55] Ibid., commentary to draft article 27, para. (2).

[56] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to draft article 18, para. (2).

[57] Ibid., para. (3).

[58] Ibid., *Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

because they entrusted (by concluding the Treaty of Rome (1957)) the European Community, and in particular the Commission, with the power to take anti-trust decisions, because those decisions may or may not infringe certain procedural rights guaranteed under human rights law binding on the member States or be contrary to customary rules on the limits to jurisdiction? The Special Rapporteur's explanations are not particularly illuminating in this regard. His example "of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty"[59] seems to be a bit far-fetched.

But also the more relevant examples relating to the jurisprudence of the European Court of Human Rights (*Waite and Kennedy*, *Bosphorus*, and *Senator Lines* cases)[60] do not support the broad language of draft article 28. While the European Court of Human Rights emphasized that States parties to the European Convention on Human Rights may not evade their obligations by transferring powers to an international organization, it also underlined that State responsibility for an act of that organization does not arise where the organization offers a level of protection equivalent to that to which member States are held by international law, in this case the European Convention on Human Rights. This criterion of equivalence is simply missing in draft article 28. As the vague term "circumvention" does not require intent to escape from one's obligations, the draft seems over inclusive. At the very least, it would have to be clarified that there is no "circumvention" if a State transfers powers to an international organization which is not bound by the State's own treaty obligations, but whose legal system offers a comparable level of guarantees. Otherwise this draft article may be very difficult to accept for the European Community.

International Monetary Fund

The International Monetary Fund has serious concerns and reservations about this draft article. The Commission's commentary points out that this provision is analogous to draft article 15, another very troubling proposal that IMF has commented on above. IMF again draws the Commission's attention to those comments on draft article 15.

For the reasons set out below, it urges the Commission to delete this provision from the draft articles.

The provision envisages two theoretical scenarios: (a) the act is wrongful for the State but not wrongful for the organization; and (b) the act is wrongful for both the State and the organization.

In the former scenario, where the act is wrongful for the State, but is not wrongful for the organization, the issue of State responsibility should be determined solely by reference to the rules on State responsibility. A provision dealing with such a situation has no place in draft articles that concern the responsibility of international organizations.

The latter scenario, where the act is wrongful for both the State and the organization, seems entirely untenable and lacking support in law or practice. The Commission wrote that "[c]ircumvention is more likely to occur when the

[59] [See A/CN.4/564/Add.1, para. 66].

[60] [Available at http://www.echr.coe.int/echr/].

international organization is not bound by the international obligation".[61] IMF would go further and say that circumvention can only occur if the organization is not bound by the international obligation, because it can foresee no circumstance in which the State could validly grant competence to the international organization to breach their common obligation.

The Commission will find no support for this latter scenario in the line of cases from the European Court of Human Rights, cited in the commentary to draft article 28, concerning the protection of fundamental human rights from circumvention by States parties to the European Convention on Human Rights. As both of the cited cases noted, the obligations under the European Convention were obligations of the contracting parties to those conventions. They were not obligations that could be readily imputed to all subjects of international law, least of all international organizations that are not parties to those conventions.[62] The decisions cited do not establish the wrongfulness of any conduct by the organizations concerned and therefore they do not bear upon a State's supposed circumvention through an international organization of their common obligation.

In advancing this latter scenario, the commentary also appears to suggest that international organizations can be vested with "competence" by a single member State. IMF does not understand how this could occur. As international organizations are created by treaties and as their competence can only be based on such treaties, it is necessary that the vesting of competence in such organizations necessarily requires action by more than one State. If the obligation in question is only binding on one or some of the States but not others, the Commission by this provision would purport to extend such obligations to the entire membership of an international organization, merely by reason of membership in the organization. This would be at odds with the rule, subsequently recognized by the Commission as a "clear" rule, that "membership does not as such entail for member States international responsibility when the organization commits an internationally wrongful act", and with the numerous judgements on this point cited by the Commission.[63] IMF therefore sees no basis for the extension of such obligations to all member States under international law.

In the event the Commission sees fit to continue advancing the provision set out in draft article 28, a further material aspect would need to be considered (in addition to the two issues addressed above). The text from the *Bosphorus Hava Yollary Turizm* case cited by the Commission contains a key temporal element that has not been addressed in the provision or the commentary.[64] The Court, in that case, stated that the "State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention".[65]

Therefore, the granting of competence to an international organization could only give rise to responsibility by States for an act of the organization if the grant of such competence occurs "subsequent" to entry into force of the obligation that is

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[61] [*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90, commentary to draft article 28, para. (7)].

[62] See, generally, Gianviti ["Economic, Social and Cultural Human Rights and the International Monetary Fund" (E/C.12/2001/WP.5 of 7 May 2001)].

[63] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90, commentary to draft article 28.

[64] Ibid., para. (4).

[65] [Judgement of 30 June 2005, not yet reported, para 154], emphasis added.

breached. The entry into force of an obligation of the States would not itself constrain the previously established competence of an international organization in which the States are members.

T. Draft article 29 — Responsibility of a State member of an international organization for the internationally wrongful act of that organization[66]

European Commission

A number of questions also arise with respect to draft article 29 on responsibility of a State member of an international organization for the internationally wrongful act of that organization. While supporting the principle deduced from *Westland Helicopters* and the *International Tin Council* case law[67] that such responsibility, if any, is presumed to be at best subsidiary (paragraph 2), the conditions under paragraph 1 are potentially very far-reaching. Under paragraph 1 (a), a State is responsible for an internationally wrongful act of an organization of which it is a member if it has accepted responsibility for that act. In this respect, it should be mentioned that in some international organizations, such as the European Community, such explicit acceptance of responsibility is severely curtailed by the "constitutional" law of the organization and hence the freedom States members of the European Community may have under the draft of paragraph 1 (a) of article 29 in reality does not go very far. For example, if a State member of the European Community assumed responsibility for a matter over which the European Community enjoyed "exclusive competence", the member State would be liable to face infringement proceedings.

Under paragraph 1 (b), a State is also responsible for illegal acts of an international organization to which it is a member if it has led the injured party to rely on its responsibility. This may be problematic as regards mixed agreements of the European Community and its member States with third States. Such agreements are concluded by both the European Community and its member States "of the one part" and another State "of the other part". Should this lead the other State to believe that the member States are responsible under international law for the implementation of the whole agreement even though large parts may fall within exclusive Community competence? Again, one may say that European Community law has to find its own solutions to such complications, but the draft of article 29 is not exactly helpful, seen from the Community's perspective.

The European Commission feels a strong need that the Community be apportioned the responsibility for any breach of its treaties. Otherwise, a third State and a member State might decide on their own about the international responsibility of the Community and hence about the interpretation of the agreement in question and about the external relations powers of the Community.

The European Commission believes that the correct approach would be for the provision to reflect the presumption that a State does not, as a general rule, incur international responsibility for the act of an international organization of which it is a member. In particular, responsibility should not be incurred merely by virtue of

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[66] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 90.

[67] [Ibid., commentary to draft article 29].

membership. This would be more consistent with existing judicial authorities. Carefully defined exceptions could then flow from this modified general rule.

Organization for the Prohibition of Chemical Weapons

The concluding sentence of paragraph (10) of the commentary reads: "There is clearly no presumption that a third party should be able to rely on the responsibility of member States".[68] It is not clear why a third party should not be able to rely on the responsibility of member States if such responsibility is established in accordance with paragraph 29 (1) (a) and (b). It may be that this statement in paragraph 10 of the commentary is based on draft article 29 (2), which describes the responsibility of States as being "subsidiary". If so, the draft articles could be more specific in elaborating on the distinction between "primary" and "subsidiary" responsibility.

Also, paragraph (12) of the commentary appears to raise many questions, and clarification is required concerning the possibility of "only of certain member States"[69] being responsible.

U. Specific issues raised in chapter III. B of the report of the International Law Commission on the work of its fifty-eighth session

1. Obligation of members of an international organization to provide compensation to the injured party

International Monetary Fund

The commentary to draft article 29, on responsibility of international organizations, acknowledges that membership in an international organization does not as such entail for member States international responsibility when the organization commits an internationally wrongful act. The International Monetary Fund observes that this follows from the Commission's previous commentary, on State responsibility, that "the general rule is that the only conduct attributed to the State at the international level is that of its organs of Government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State".[70]

However, as IMF has noted in its previous comments, in the specific context of State membership in an international organization, such a general principle would also need to be subject to the rules of the organization. Therefore, if the States members of an international organization have made provision in the rules of the organization for the members' derivative liability for the organization's conduct, those rules of the organization would provide the basis for determining whether a particular member State is liable for particular conduct of the organization.

It follows that members would ordinarily not have an obligation to provide compensation to the injured party, should the organization not be in a position to do so, unless the rules of the organization called for the members to provide such compensation. IMF believes this is the only conclusion that is consistent with the

[68] [Ibid., para. (10)].

[69] [Ibid., para. (12)].

[70] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to chapter II, para. (2).

following established principles: (a) international organizations have independent legal personalities; (b) "attribution" is a necessary requirement for a State to be responsible for a wrongful act; and (c) liability to compensate can only be based on State responsibility or another rule that is binding on the State (i.e., in the present case, the rules of the organization).

Organization for the Prohibition of Chemical Weapons

The question itself appears to the Organization for the Prohibition of Chemical Weapons somewhat opaque. It would be helpful to have illustrations of circumstances in which some member States are responsible for the acts of an organization while others are not. This appears to the Organization for the Prohibition of Chemical Weapons to be the threshold question.

Beyond that, the question posed in paragraph 28 (a) of the report of the International Law Commission on the work of its fifty-eighth session is related to draft article 29 (responsibility of a State member of an international organization for the internationally wrongful act of that organization), according to which a member State is responsible for an internationally wrongful act of an international organization if it has either accepted responsibility or has led the injured party to rely on its responsibility. It is presumed that responsibility entails an obligation to provide compensation to the injured party, and it may thus be presumed that if a member State is not responsible, it has no obligation to compensate the injured party.

However, it is essential to bear in mind that liability can exist without responsibility; an obligation to compensate may arise even in the absence of fault (strict liability). Thus, in the final analysis, the answer would depend on the substantive obligation that has been breached, i.e., the standard of conduct required. Some obligations might require fault while others might not.

2. Obligation of cooperation in case of a serious breach by an international organization of an obligation under a peremptory norm of general international law

International Monetary Fund

As international organizations are bound by peremptory norms of general international law, it follows that States should have the same positive duty to cooperate to bring an end to serious breaches of peremptory norms by international organizations as they do to bring an end to serious breaches by States.

International organizations, for their part, are involved in bringing an end to such breaches of peremptory norms by subjects of international law to the extent they provide the framework for such State cooperation, or are tasked by their memberships to give aid or assistance in such State cooperation.

However, unlike States, international organizations do not possess a general competence. It follows that international organizations cannot have the identical duty as States to bring an end to serious breaches of peremptory norms. Rather, any such duty of international organizations would need to take into account the limited competence of the organizations as established by their respective charters.

The International Monetary Fund is unaware of any existing practice that would demonstrate the existence of a general obligation on the part of international organizations to cooperate in exactly the same manner as States. Rather, practice

would suggest that any obligation of international organizations to cooperate would be subject to, and limited by, provisions of their respective charters.

For instance, in another context, it has been argued erroneously that "there are strong legal arguments to support the position that IMF is obligated in accordance with international law, to take account of human rights considerations. The first is that [IMF] is a United Nations body and must therefore be bound by the principles stated in the United Nations Charter. Among those principles and purposes of the organization is the promotion of respect for human rights. It is not therefore a political objective, but a legally mandated one".[71]

This argument is based on a number of incorrect assumptions, as has already been noted by François Gianviti, the former General Counsel of IMF.[72] In particular, IMF is not a "United Nations body" as asserted. Rather, it is a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations.[73] In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in which the United Nations recognizes that, "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent international organization".[74] Furthermore, article X of the Fund's Articles of Agreement, while requiring the Fund to cooperate with "any general international organization" [i.e., the United Nations], specifies that "[a]ny arrangements for such cooperation which would involve a modification of any provision of [the Articles of Agreement] may be effected only after amendment to [the Articles]". Thus, the relationship established by the 1947 Agreement is not one of "agency"[75] but one of "sovereign equals".[76]

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[71] Philip Alston, "Symposium: 1986 World Food Day and Law Conference: 'The Legal Faces of the Hunger Problem: IX Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food'", How. L. J. vol. 30 (1987), p. 473 at p. 479.

[72] See François Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund" (E/C.12/2001/WP.5 of 7 May 2001).

[73] In the French text of the Charter of the United Nations the equivalent references to "specialized agencies" in Articles 57, 63 and 64 are "les diverses institutions spécialisées", "toute institution visée à l'Article 57" and as "les institutions spécialisées", respectively. The "spécialisées" clearly refers to the specialized responsibilities of these organizations, but as the French text demonstrates, the term "agencies" is not used in the English text of the Charter in the sense of denoting a principal-agent relationship; rather it is used in the sense of referring to organizations.

[74] Agreement between the United Nations and the International Monetary Fund, 14 November 1947, article I, para. 2, available at http://www.imf.org/external/pubs/ft/sd/index.asp.

[75] In order to avoid any ambiguity on this point, a statement was placed in the record of the negotiations stating that "it was understood that the statement in article I, paragraph 2, that the Bank (Fund) is a specialized agency established by agreement among its member Governments carries with it no implication that the relationship between the United Nations and the Bank (Fund) is one of principal and agent". Committee on Negotiations with Specialized Agencies, "Report on Negotiations with the International Bank for Reconstruction and Development and the International Monetary Fund", quoted in William E. Holder, "The Relationship Between the International Monetary Fund and the United Nations", in Robert C. Effros (ed.), *Current Legal Issues Affecting Central Banking*, IMF, 1997, vol. 4, at p. 18.

[76] Leland M. Goodrich and others, *Charter of the United Nations, Commentary and Documents* (New York, Columbia University Press, 1969), p. 421.

Furthermore, article VI, paragraph 1, of the relationship Agreement between the United Nations and IMF provides that "the Fund takes note of the obligation assumed, under paragraph 2 of Article 48 of the United Nations Charter, by such of its members as are also Members of the United Nations, to carry out the decisions of the Security Council through their action in the appropriate specialized agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter".[77]

As noted by William Holder, the former Deputy General Counsel of IMF, this provision presents quite a different balance to that put forward by the United Nations initially, which would have imposed an obligation imposed more directly on the organization.[78] Under this provision of the relationship Agreement, a Security Council resolution is not binding on IMF itself: the binding obligation stemming from a Security Council resolution is directed at "members" of the United Nations. The Fund, while a subject of international law, is not a member of the United Nations. Furthermore, the obligation of the Fund under the provision in the Agreement, is to "have due regard" to Security Council resolutions under Articles 41 and 42 of the Charter of the United Nations.[79]

It follows from the above, that the Fund's relationship Agreement with the United Nations does not require IMF to give effect to the Charter or resolutions of the United Nations.

Another example of the effect of provisions in an organization's charter that may be relevant to this discussion are the views expressed by Ibrahim Shihata, the former General Counsel of the World Bank, when discussing the treatment of the General Assembly resolutions passed in the 1960s regarding South Africa and Portugal, which called on international financial institutions not to give financial assistance to these countries:

> "The Bank took the firm position that by virtue of the relationship Agreement [between the Bank and the United Nations], it [i.e., the Bank] was under no obligation to implement the United Nations General Assembly resolutions, not to mention those on which there had been no prior consultation with the Bank. It further argued that it would be improper for it to accept the recommendations of the General Assembly in the cases involved because of the prohibition contained in article IV, section 10, of the Bank's Articles of Agreement, which reads:
>
> > 'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighed impartially in order to achieve the purposes stated in article I.'"[80]

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[77] Agreement between the United Nations and the International Monetary Fund, approved by the Board of Governors of IMF on 17 September 1947 and by the General Assembly of the United Nations on 15 November 1947; entered into force on 15 November 1947.

[78] W. Holder, supra note 75, at p. 21.

[79] Ibid.

[80] See Ibrahim Shihata, *The World Bank in a Changing World: Selected Essays*, vol. 1, Martinus Nijhoff, 1991, at p. 103 (footnotes omitted).

Shihata went on to note that the controversy over the South Africa and Portugal resolutions ended "with the Bank maintaining its position that it was prohibited under its articles from interfering in the political affairs of its members but would review the economic conditions and prospects of these two countries 'to take account of the situation as it developed'".[81]

If, notwithstanding the above, the Commission believes that framing such an obligation on the part of international organizations, in the same terms as the obligation applicable to States, would contribute to the progressive development of international law, then the Commission should, in evaluating the possible scope of such an obligation for international organizations, pay due regard to the limited capacity and other constraints that apply, under current international law, to actions by international organizations.

Organization for the Prohibition of Chemical Weapons

States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State.

In principle, international organizations are legal persons and should be bound to bring an end to violations of peremptory norms, as must be the case with all subjects of the law. However, there are some practical issues to be taken into account. While the legal personality of States is in principle not limited, the legal personality of international organizations is limited by its mandate, its powers, and its rules as set out in its constituent instrument. Thus, it can be argued that the extent of the obligation of any international organization to bring a breach of jus cogens to an end, unlike that of States, should also be limited by the same, i.e., it must always act within its mandate and in accordance with its rules.

Finally, as regards the obligation to cooperate to bring the situation to an end, reference may be made to article 41(1) of the Articles on Responsibility of States for Internationally Wrongful Acts regarding the modalities of such cooperation.[82]

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[81] Ibid., at p. 104.

[82] In para. (2) of the commentary to article 41 on Responsibility of States for Internationally Wrongful Acts, it is stated that "[b]ecause of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph (1) also envisages the possibility of non-institutionalized cooperation". Para. (3) adds that such cooperation "must be through lawful means, the choice of which will depend on the circumstances of the given situation". Notably, "the obligation to cooperate applies to States whether or not they are individually affected by the serious breach". Most importantly, para. (3) stipulates that "in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy" [*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 77, commentary to article 41, paras. (1)-(3) (emphasis added).

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Fifth report on responsibility of international organizations*

by Giorgio Gaja, Special Rapporteur

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I. Introduction

1. The International Law Commission has so far provisionally adopted 30 draft articles on "Responsibility of international organizations".[1] These articles build up Part One, entitled "The internationally wrongful act of an international organization". They include an introduction (articles 1 to 3) that considers the scope of the draft, defines the use of terms and states a few general principles. This introduction is followed by chapters on attribution of conduct to international organizations (articles 4 to 7), breach of an international obligation (articles 8 to 11), responsibility of an international organization in connection with the act of a State or another international organization (articles 12 to 16), circumstances precluding wrongfulness (articles 17 to 24) and responsibility of a State in connection with the act of an international organization (articles 25 to 30).

2. While the latter chapter does not have a parallel in the articles on responsibility of States for internationally wrongful acts,[2] articles 1 to 24 of the current draft follow the pattern and often the language of articles 1 to 27 on State responsibility, which build up Part One of those articles, entitled "The internationally wrongful act of a State": this is not a mechanical replica of the earlier text nor based on a presumption that solutions applying to States are generally applicable to international organizations, but is the result of an analysis of the available materials.

3. There are a few outstanding issues that concern Part One of the draft articles on responsibility of international organizations. Article 2 on the use of terms should no doubt be widened in order to include at least the definition of "rules of the organization", which has provisionally been placed in article 4, paragraph 4. The text of article 19 on "countermeasures" has been left blank pending an examination of the issues relating to countermeasures by an international organization: this will be undertaken in the context of the study of implementation of responsibility. A decision will have to be taken on the placement of the chapter concerning responsibility of a State in connection with the act of an international organization. Some provisions will have to be added, in a place yet to be determined, with regard to the responsibility of an international organization as a member of another international organization, since articles 28 and 29 only consider the case of members of international organizations that are States.

4. While decisions on some of these questions could be taken at the forthcoming session, it seems preferable to postpone all these decisions to the time when the Commission will have the opportunity to reconsider certain issues that are dealt with in the draft articles hereto provisionally adopted, in the light of the comments made by States and international organizations. While this could take place at the second reading, a practical reason suggests that it should preferably be done before the end of the first reading.[3] This reason consists in the fact that the Commission has so far provisionally adopted all its draft articles on the current topic at the same session in

[1] The text of the draft articles is reproduced in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. VII, sect. C, para. 90.

[2] The text of these articles and their related commentaries are reproduced in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 77.

[3] This suggestion was already voiced in my second (A/CN.4/541), para. 1, and third report (A/CN.4/553), para. 1.

which the respective drafts were submitted by the Special Rapporteur. Thus, unlike what occurred with regard to most other topics, in its work on responsibility of international organizations the Commission has so far been able to avail itself only of responses given to questions raised in chapter III of its annual reports. These concerned specific issues on which comments were considered to be of particular interest to the Commission. The Commission has not yet been able to take further comments made in the Sixth Committee and in written observations into account.

5. The reconsideration of certain issues would no doubt greatly benefit from elements of practice that States and international organizations could supply in the meantime. Any indication of accessible materials that the Commission may have ignored[4] would also be helpful. A wider knowledge of practice would clearly allow a better apprehension of questions relating to the international responsibility of international organizations. Moreover, the Commission would then be more consistently able to illustrate its draft articles with examples drawn from practice.

6. The review of the articles provisionally adopted before the end of the first reading will be introduced by a comprehensive analysis by the Special Rapporteur of the comments made by States and international organizations and of practice that has taken place or has become accessible since the draft articles were originally adopted. Views expressed in legal writings would also be considered.

7. It may be useful to make at this stage a couple of preliminary comments. One of the remarks frequently made on the current draft is that it takes insufficiently into account the great variety of international organizations.[5] However, most, if not all, articles that the Commission has so far adopted on international responsibility, whether of States or of international organizations, have a level of generality that does not make them appropriate only for a certain category of entities. The fact that certain articles, for instance, the article on self-defence, are unlikely to be relevant for many international organizations does not require as a consequence that the draft should not include a general provision that refers to all international organizations. The inclusion of such a provision does not imply that all international organizations would necessarily be affected. On the other hand, should the particular features of certain international organizations warrant the application of some special rules, this could be taken into account by including a text similar to article 55 on State responsibility in the final provisions of the draft; according to that provision, the articles on State responsibility "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

8. My second remark concerns an aspect of the definition of international organization that is given in draft article 2. This states that an international

[4] This is not the case of the judgement of the European Court of Human Rights in *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*. Although the Austrian delegation maintained that "the draft did not take the *Bosphorus* decision into account" (A/C.6/61/SR.13), para. 40, the key passage of this judgement had been quoted *in extenso* and endorsed in paragraph 4 of the commentary on article 28. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), at pp. 284-285.

[5] For instance, the delegation of the United Kingdom of Great Britain and Northern Ireland complained of "no allowance [being made] for the diversity of types of international organizations and of their functions" (A/C.6/61/SR.15), para. 24.

organization is covered by the current draft only if it is an entity possessing "its own international legal personality". This is easily understandable since an international organization that has no legal personality under international law cannot be held internationally responsible. The text of draft article 2 does not say whether legal personality depends or not on the recognition by the injured State. Only the commentary notes that the International Court of Justice:

> "appeared to favour the view that when legal personality of an organization exists, it is an 'objective' personality. Thus it would not be necessary to enquire whether the legal personality of an organization has been recognized by an injured State before considering whether the organization may be held internationally responsible according to the present draft articles".[6]

9. Some comments were made to the effect that the draft articles should consider recognition of an international organization on the part of the injured States as a prerequisite of its legal personality and hence of its international responsibility. For instance, this seems implied by the Director-General of Legal Service of the European Commission when he made the following criticism in a letter of 18 December 2006:

> "The Commission is also of the view that a clear distinction must be made between the legal positions of States that are members of international organizations, third States that recognize the organization and third States that explicitly refuse to do so."[7]

Should one accept this view, the consequence would be that responsibility of an international organization would arise only towards non-member States that recognize it. With regard to non-member States that do not recognize the organization, member States would have to be held responsible and the articles on State responsibility would then apply. The content of the draft articles on the responsibility of international organizations would not be affected.

10. The quoted passage from the letter of the European Commission also mentions the need to single out the relations between an international organization and its member States. It should not be controversial that an international organization incurs international responsibility for the breach of an obligation under international law that it may have towards its member States. However, the rules of the organization may come into play with regard to the content of international responsibility and its implementation. The first issue will be considered in this report in section II below, and the second one in the following report.

11. Postponing the review of some of the questions already dealt with in the articles provisionally adopted is not likely to affect the analysis of the following

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[6] Paragraph 9 of the commentary to article 2. See *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, para. 54.

[7] See A/CN.4/582, sect. II, E. A similar view was expressed by the Austrian delegation (A/C.6/61/SR.13, para. 36). Curiously, the European Commission's view that absence of recognition by non-member States is relevant is close to the approach that the Soviet Union had taken for several years towards the European Community. This outdated practice was recently invoked as an argument for maintaining that recognition is a prerequisite of legal personality by Maurice Mendelson, "The definition of 'international organization' in the International Law Commission's current project on the responsibility of international organizations", in Maurizio Ragazzi (ed.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 371, at p. 387.

parts of the draft. In accordance with the general pattern of the articles on State responsibility, the questions still to be addressed are "content of the international responsibility", "implementation of the international responsibility" and "general provisions".

12. The present report addresses issues relating to the content of international responsibility. The analysis will be divided into sections corresponding to the three chapters of Part Two of the articles on State responsibility: "general principles", "reparation for injury" and "serious breaches of obligations under peremptory norms of general international law".

II. Content of the international responsibility of an international organization: general principles

13. The applicability to international organizations of the first three of the general principles that are stated in Part Two on State responsibility seems uncontroversial. The first one (article 28 on State responsibility) is merely an introduction to Part Two and says that the following articles define the legal consequences of the internationally wrongful act. Since the current draft is intended to follow the same general pattern as that of the articles on State responsibility, a similar provision can usefully be included with regard to the responsibility of international organizations.

14. Part One of the current draft envisages certain cases in which the responsibility of States arises in connection with that of an international organization. The content of the responsibility concerning a State would then be covered by the rules that generally apply to the international responsibility of States. This seems self-explanatory. It is therefore not necessary to restate those rules in the present draft or to make a reference to the articles adopted by the Commission in 2001.

15. Article 29 on State responsibility asserts that the breach of an international obligation and the new set of legal relations which result from an internationally wrongful act do not affect the continued existence of the obligation breached as long as the obligation has not ceased. As was outlined in the commentary on article 29:

> "Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation."[8]

For instance, an obligation not to interfere with the internal affairs of a State does not cease according to whether or not it has been breached, while an obligation to preserve a certain object ends once the object has been destroyed. Also in this regard, the fact that the obligation rests on a State or on an international organization is immaterial.

16. The first part of article 30 on State responsibility represents an implication of what has been stated in the previous article. If the international obligation that was breached subsists and the breach continues, the author of the wrongful act is required to cease that act. This clearly applies to international organizations as well

[8] Paragraph 4 of the commentary on article 29. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 216.

as to States. It is not a legal consequence of the breach but of the fact that the obligation subsists.

17. The same article also provides for assurances and guarantees of non-repetition. These are not per se legal consequences of the breach of an international obligation although only the occurrence of a breach may reveal the need for those assurances and guarantees in order to prevent a repetition of the wrongful act. While the related practice mainly concerns States, there is no reason to distinguish international organizations from States in this respect and to rule out that assurances and guarantees may also be required from international organizations.

18. Given the applicability of the three principles hereto considered also to international organizations, the following texts, which are as close as possible to the corresponding articles on State responsibility, are proposed:

Draft article 31
Legal consequences of an internationally wrongful act

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Draft article 32
Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

Draft article 33
Cessation and non-repetition

The international organization responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

19. Article 31 on State responsibility declares that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The provision further specifies that "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

20. The principle stated in the articles on State responsibility reflects the well-known dictum by the Permanent Court of International Justice in the *Factory at Chorzów* case that:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[9]

[9] *Jurisdiction, P.C.I.J., Series A*, 1927, *No. 9*, p. 21.

In the same case the Permanent Court later added:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[10]

21. Although the Permanent Court was considering relations between States, the principle requiring reparation is worded more generally so as to apply to breaches of international obligations by any subject of international law. As was recently noted by France in the Sixth Committee:

> "The jurisprudence of the *Chorzów Factory* case should apply as much to international organizations as to States."[11]

22. It would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts.[12] This would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law.

23. The existence of an obligation to make reparation has often been acknowledged by international organizations. A particularly clear example may be found in a report by the United Nations Secretary-General on the administrative and budgetary aspects of the financing of United Nations peacekeeping operations:

> "The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces."[13]

24. In its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice considered "the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity" and said:

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[10] *Merits, P.C.I.J., Series A*, 1928, *No. 17*, p. 47.

[11] A/C.6/61/SR.14, para. 63.

[12] According to C. Dominicé, "The international responsibility of the United Nations for injuries resulting from non-military enforcement measures", in Maurizio Ragazzi (ed.), *International responsibility today: essays in memory of Oscar Schachter* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 363, at p. 368, articles 28 to 39 on State responsibility "express rules of customary international law. They are without a doubt also to be applied in matters of international responsibility of international organizations, including the United Nations". However, J. E. Alvarez, "International organizations: accountability or responsibility?" (http://www.asil.org) recently wrote: "When it comes to international organizations, some of which are purposely kept by their members at the edge of bankruptcy, the concept of responsibility-cum-liability seems something only a law professor (or the writer of a Jessup Moot problem) would love".

[13] A/51/389, para. 16.

> "The United Nations may be required to bear responsibility for the damage arising from such acts."[14]

25. Practice of international organizations concerning reparation for wrongful acts is extensive, although compensation is not seldom granted ex gratia even when it may be due under international law. One must also consider that, with regard both to international organizations and to States, claims for reparation are not always actively pursued by the injured party, whose main interest may be the cessation of the wrongful act. Some instances of practice relating to reparation by international organizations will be referred to in section III of the present chapter.

26. The fact that reparation may apply also to moral damages by international organizations finds confirmation in practice, especially in judgements by administrative tribunals, for instance in the judgement given by the United Nations Administrative Tribunal on 17 November 2000 in *Robbins v. The Secretary-General of the United Nations*,[15] or in arbitral awards, such as that of 4 May 2000 in *Boulois v. UNESCO*.[16]

27. Part One of the current draft identifies some cases in which States that are members of an international organization incur responsibility in connection with an internationally wrongful act of the organization. Should member States not incur responsibility, the problem arises whether they have any obligation to provide the organization with the necessary means to face claims for reparation, especially when reparation implies some financial compensation that exceeds the budgetary resources of the organization. In chapter III of its 2006 report to the General Assembly, the Commission asked the following question:

> "Do members of an international organization that are not responsible for an internationally wrongful act of that organization have an obligation to provide compensation to the injured party, should the organization not be in a position to do so?"[17]

28. With one or two possible exceptions, all the States that responded were firm in holding that there was "no basis for such an obligation".[18] The same view was

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[14] ICJ Reports 1999, para. 66, at pp. 88-89.

[15] AT/DEC/974. The Tribunal concluded that "[t]he seriousness of the wrong and moral injury done the Applicant warrants more than the compensation paid her by the Respondent".

[16] Unpublished. The Tribunal awarded the sum of two million French francs for "moral damage".

[17] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28 (a).

[18] Thus the delegation of the Netherlands saw no basis for such an obligation (A/C.6/61/SR.14, para. 23). Similar views were expressed by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 32; Belgium (A/C.6/61/SR.14), paras. 41 and 42; Spain (A/C.6/61/SR.14), paras. 52-53; France (A/C.6/61/SR.14), para. 63; Italy (A/C.6/61/SR.14), para. 66; United States of America (A/C.6/61/SR.14), para. 83; Belarus (A/C.6/61/SR.14), para. 100; Switzerland (A/C.6/61/SR.15), para. 5; Cuba (A/C.6/61/SR.16), para. 13; and Romania (A/C.6/61/SR.19), para. 60. The delegation of Belarus, however, suggested that "a scheme of subsidiary responsibility for compensation could be established as a special rule, for example in cases where the work of the organization was connected with the exploitation of dangerous resources" (A/C.6/61/SR.19, para. 100). Although sharing the prevailing view, the delegation of Argentina (A/C.6/61/SR.13, para. 49) requested the Commission to "analyse whether the special characteristics and rules of each organization, as well as considerations of justice and equity, called for exceptions to the basic rule, depending on the circumstance of each case".

expressed in a statement by the Organization for the Prohibition of Chemical Weapons.[19] This seems consistent with practice, which does not show any instance that would clearly support the existence of the obligation in question under international law.[20]

29. A different question is whether an obligation for members to provide financial support exists under the rules of the organization concerned. As was stated by the delegation of Belgium:

> "If those contributions were in keeping with the law of the international organization, the members would have to comply. That did not signify that the members were under an obligation to make reparation to the injured third party or that the latter could institute direct or indirect action against the members."[21]

In other words, the existence of an obligation for member States would entirely depend on the rules of the organization; when the obligation existed, it would benefit the injured party only indirectly. Several States took the same view.[22] According to the Russian Federation, States establishing an international organization are required to "give it the means to fulfil its functions, including those which had led it to incur responsibility towards a third party",[23] but apparently also this would not imply that an obligation arises towards the injured party.[24]

30. The views expressed in response to the Commission's question make it clear that, while the Commission should state the principle that international organizations are required to provide reparation for their internationally wrongful acts, no additional obligation should be envisaged for member States. The same applies to international organizations that are members of other organizations. Obligations existing for member States or organizations under the rules of the responsible organization need not be recalled here.

31. On the basis of the foregoing remarks, the following text is proposed:

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[19] See A/CN.4/582, sect. II, G., 1.

[20] The opinion that "members are obliged not to compensate creditors directly, but to put the organization in funds to meet the liabilities" was voiced by Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (3rd ed.) (The Hague/London/Boston: Martinus Nijhoff Publishers, 1995), p. 992. See also H. G. Schermers, "Liability of international organizations", *Leiden Journal of International Law*, vol. 1 (1988), p. 3, at pp. 12 and 13. Moshe Hirsch, *The responsibility of international organizations toward third parties* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), p. 165, added that "[w]here the organization does not comply with its duty to resort to all the available legal measures available to it (including litigation) against the recalcitrant members, the injured party should be entitled to implement the rights of the organization and bring claims against those members". According to Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/Editions de l'Université de Bruxelles, 1998), pp. 599-600, this opinion has no legal basis.

[21] A/C.6/61/SR.14, para. 42.

[22] Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 32; Spain (A/C.6/61/SR.14), para. 53; France (A/C.6/61/SR.14), para. 63 and Switzerland (A/C.6/61/SR.15), para. 5.

[23] A/C.6/61/SR.18, para. 68.

[24] This was made clear in the similar remark by the Netherlands (A/C.6/61/SR.14, para. 24).

Draft article 34
Reparation

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

32. Article 32 on State responsibility provides that "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part". The relations between international law and the internal law of a State are not similar to those existing between international law and the internal rules of an international organization. As has already been noted, in relation to draft article 8, the latter rules are, at least to a large extent, part of international law.[25] They cannot thus be considered irrelevant in respect of the obligations under the present Part.

33. A distinction needs to be made, however, between obligations that international organizations have towards their members and those that they possess towards non-members. With regard to non-members, the rules of the organization are like the internal rule of a State and cannot per se impinge on the obligations set out in this Part. On the contrary, those rules may affect the relations of the organization with its members. This possibility must be reflected in the text of the current draft.

34. Article 32 on State responsibility is said to be "modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[26] Although the corresponding article of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations similarly states that "an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty",[27] it seems logical to introduce a distinction between relations concerning non-members and those concerning members and provide for a possible exception for the latter case. This is to be worded so as not to affect the obligations that members have with regard to serious breaches of obligations arising under a peremptory norm of general international law in accordance with chapter III.

35. The following text is here suggested:

Draft article 35
Irrelevance of the rules of the organization

Unless the rules of the organization otherwise provide for the relations between an international organization and its member States and

[25] Paragraph 5 of the commentary to article 8, *Official Records of the General Assembly, Sixtieth session, Supplement No. 10* (A/60/10), chap. VI, para. 206.

[26] Para. 2 of the commentary to article 32. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 232.

[27] Article 27, para. 2.

organizations, the responsible organization may not rely on the provisions of its pertinent rules as justification for failure to comply with the obligations under this Part.

36. The last item that the articles on State responsibility consider in the corresponding chapter of Part Two, and also the last one that needs to be examined here, is the scope of international obligations set out in this Part. While Part One of the articles on State responsibility covers all the cases of internationally wrongful acts committed by a State, Part Two is limited to the obligations that the responsible State owes "to another State, to several States, or to the international community as a whole"; this "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". The scope of Part Three, concerning implementation of international responsibility, is limited in the same way.

37. There are good reasons for taking a similar option with regard to international organizations and thus limiting the scope of Part Two to obligations that a responsible organization has towards one or more other organizations, one or more States, or the international community. This would not only be a way of following the general pattern provided by the articles on State responsibility, it would also avoid the complications that would no doubt arise if one widened the scope of obligations here considered in order to include those existing towards subjects of international law other than States or international organizations.

38. The following text is proposed:

Draft article 36
Scope of international obligations set out in this Part

1. The obligations of the responsible international organization set out in this Part may be owed to one or more other organizations, to one or more States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to a person or entity other than a State or an international organization.

III. Reparation for injury

39. Consistently with the principle of reparation set out in article 31, articles 34 to 39 on State responsibility examine the various forms of reparation. Article 34 has an introductory character, while the other provisions cover restitution, compensation, satisfaction, interest and contribution to the injury.

40. If one accepts that responsible international organizations are under an obligation to provide reparation in the same way as States, it is difficult to see why restitution, compensation or satisfaction should be excluded or apply differently

when the responsible entity is an international organization rather than a State. The same applies to interest and contribution to the injury.

41. Thus, in a note of 24 June 1970, the Director General of the International Atomic Energy Agency [IAEA], considering the "international responsibility of the Agency in relation to safeguards", wrote:

> "Although there may be circumstances when the giving of satisfaction by the Agency may be appropriate, it is proposed to give consideration only to reparation properly so called. Generally speaking, reparation properly so called may be either restitution in kind or payment of compensation."[28]

42. While practice relating to reparation given by international organizations is certainly more limited than practice concerning responsible States, one may find examples of international organizations providing the various forms of reparation.

43. The principle that restitution, whenever possible, should be given by an international organization was for instance expressed by the Administrative Tribunal of the United Nations in *Leak v. The Secretary-General of the United Nations* with the following words:

> "it is probably no longer possible at the present time for the Respondent to restore the situation — in respect of the re-employment of the Applicant — that would have existed if the summary dismissal had never taken place. That being so, an award of compensation is the only means of drawing, in this respect, the legal inferences from the obligations resulting from the rescission."[29]

44. With regard to compensation provided by an international organization, the most well-known instance of practice concerns the settlement of claims arising from the United Nations Operation in the Congo. Compensation of nationals of Belgium, Switzerland, Greece, Luxembourg and Italy was granted through exchanges of letters between the Secretary-General and the permanent missions of the respective States. In the text of each letter, the United Nations:

> "stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties."[30]

With regard to the same operation, further settlements were made with Zambia, the United States of America, the United Kingdom of Great Britain and Northern Ireland and France,[31] and also with the International Committee of the Red Cross.[32]

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[28] GOV/COM.22/27, para. 27 (contained in an annex to A/CN.4/545, which is on file with the Codification Division of the Office of Legal Affairs and available for consultation).

[29] Judgement No. 97 of 4 October 1965 (available at http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_00097_E.pdf).

[30] United Nations, *Treaty Series*, vol. 535, p. 191 at p. 199; vol. 564, p. 193; vol. 565, p. 3; vol. 585, p. 147; and vol. 588, p. 197.

[31] See Kirsten Schmalenbach, *Die Haftung Internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), at pp. 314-321.

[32] The text of the agreement was reproduced by Konrad Ginther, *Die Völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Wien/New York: Springer, 1969), pp. 166-167.

45. The fact that these compensations were given as reparation for breaches of obligations under international law may be gathered not only from some of the claims but also from a letter, dated 6 August 1965, addressed by the Secretary-General to the Permanent Representative of the Soviet Union. In this letter, the Secretary-General said:

> "It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore."[33]

46. A report of the United Nations Secretary-General dated 20 September 1996 on the administrative and budgetary aspects of the financing of the United Nations peacekeeping operations recalled that:

> "The applicability of international humanitarian law to United Nations forces when they are engaged as combatants in situations of armed conflict entails the international responsibility of the Organization and its liability in compensation for violations of international humanitarian law committed by members of United Nations forces. The scope of third-party liability of the Organization, however, will have to be determined in each case according to whether the act in question was in violation of any particular rule of international humanitarian law or the laws of war."[34]

Criteria and guidelines for the payment of compensation were approved by the General Assembly in its resolution 52/247 on third-party liability resulting or arising from peacekeeping operations conducted by the United Nations.[35]

47. In relation to some incidents that had occurred during the NATO air strikes in 1999, the Ombudsperson Institution in Kosovo requested NATO to provide "some kind of relief" for the victims, including "the possibility of compensation".[36]

48. A reference to the obligation for the United Nations to pay compensation was also made by the International Court of Justice in its Advisory Opinion on

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[33] *United Nations Juridical Yearbook*, 1965, p. 41. The view that the United Nations placed its responsibility at the international level was maintained by J.J.A. Salmon, "Les accords Spaak-U Thant du 20 février 1965", *Annuaire français de droit international*, vol. 11 (1965), p. 468, at pp. 483 and 487.

[34] A/51/389, para. 16.

[35] General Assembly resolution 52/247 of 26 June 1998 on third-party liability: temporal and financial limitations.

[36] "Attempts to obtain an official recognition of damages caused to victims of the 1999 NATO bombing of the bridge in Luzhan/Luzane", www.csotan.org/textes/KOSOVO%20Ombudsman%20rep2004.pdf. Arrangements made by NATO and IFOR for damages caused in Bosnia-Herzegovina were described by M. Guillaume, "La réparation des dommages causés par les contingents français en ex-Yougoslavie et en Albanie", *Annuaire français de droit international*, vol. 43 (1997), at p. 151-155.

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights.[37]

49. Practice offers some examples of satisfaction, generally in the form of an apology or an expression of regret. Although the examples that follow do not expressly refer to the existence of a breach of an obligation under international law, they at least imply that an apology or an expression of regret by an international organization would be one of the appropriate legal consequences for such a breach.

50. With regard to the fall of Srebrenica, the United Nations Secretary-General said:

> "The United Nations experience in Bosnia was one of the most difficult and painful in our history. It is with the deepest regret and remorse that we have reviewed our own actions and decisions in the face of the assault on Srebrenica."[38]

51. On 16 December 1999, when receiving the report of the independent enquiry into the actions of the United Nations during the 1994 genocide in Rwanda, the Secretary-General stated:

> "All of us must bitterly regret that we did not do more to prevent it. There was a United Nations force in the country at the time, but it was neither mandated nor equipped for the kind of forceful action which would have been needed to prevent or halt the genocide. On behalf of the United Nations, I acknowledge this failure and express my deep remorse."[39]

52. Shortly after the NATO bombing of the Chinese embassy in Belgrade, a NATO spokesman, Jamie Shea, said in a press conference:

> "I think we have done what anybody would do in these circumstances, first of all we have acknowledged responsibility clearly, unambiguously, quickly; we have expressed our regrets to the Chinese authorities."[40]

A further apology was addressed on 13 May 1999 by the German Chancellor Gerhard Schroeder on behalf of Germany, NATO and NATO Secretary-General Javier Solana to Foreign Minister Tang Jiaxuan and Premier Zhu Rongji.[41]

53. With regard to contribution to the injury, one author referred to an unpublished document relating to the shooting of a civil vehicle in the Congo in which compensation by the United Nations was reduced because of the contributory negligence by the driver of the vehicle.[42]

54. The following draft articles, which are based on the corresponding articles on State responsibility, are here proposed:

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[37] ICJ Reports 1999, para. 66 at pp. 88-89.

[38] Report of the Secretary-General pursuant to General Assembly resolution 53/35: the fall of Srebrenica (A/54/549), para. 503.

[39] www.un.org/News/ossg/sgsm_rwanda.htm.

[40] http://www.ess.uwe.ac.uk/kosovo/Kosovo_Mistakes2.htm.

[41] "Schroeder issues NATO apology to the Chinese", archives.tcm.ie/irishexaminer/1999/05/13/fhead.htm.

[42] Pierre Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: bruglant/Editions de l'Université de Bruxelles, 1998), at p. 606.

Draft article 37
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Draft article 38
Restitution

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Draft article 39
Compensation

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Draft article 40
Satisfaction

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

Draft article 41
Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Draft article 42
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

IV. Serious breaches of obligations under peremptory norms of general international law

55. Like internationally wrongful acts committed by States, infringements by international organizations may constitute serious breaches of obligations under peremptory norms of general international law. The problem arises whether international organizations would then incur the same additional consequences that are defined for States in article 41 on State responsibility. These include the duty of States other than the responsible State to cooperate to bring the breach to an end.

56. Even if it would be difficult to find any specific practice relating to this type of infringement by an international organization, there appears to be no reason why the situation of an international organization should in this case be any different from that of a State. As was observed by the Organization for the Prohibition of Chemical Weapons:

> "States should definitely be under an obligation to cooperate to bring such a breach to an end because in the case when an international organization acts in breach of a peremptory norm of general international law, its position is not much different from that of a State."[43]

57. The same approach was taken by several States[44] in response to a question raised by the Commission in its 2006 report to the General Assembly.[45] For instance, the Spanish delegation said that:

> "[t]here were not sufficient grounds *a priori* for concluding that, in the event of an international organization committing a serious breach of an obligation stemming from a peremptory norm, a regime different to that laid down for

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[43] See A/CN.4/582, sect. II, G., 2.

[44] Thus the interventions by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 33; Argentina (A/C.6/61/SR.13), para. 50; Netherlands (A/C.6/61/SR.14), para. 25; Belgium (A/C.6/61/SR.14), paras. 43 to 46; Spain (A/C.6/61/SR.14), para. 54; France (A/C.6/61/SR.14), para. 64; Belarus (A/C.6/61/SR.14), para. 101; Switzerland (A/C.6/61/SR.15), para. 8; Jordan (A/C.6/61/SR.16), para. 5; Russian Federation (A/C.6/61/SR.18), para. 68; and Romania (A/C.6/61/SR.19), para. 60.

[45] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28.

> cases in which the same conduct would be attributable to a State should apply."[46]

58. Certain States have emphasized in their response the role that States should play, when cooperating to bring the breach by an international organization to an end, if they are members of that organization.[47] One may agree that the duty to cooperate is particularly significant when States are in a position to make a significant contribution in order to achieve the intended result and also that in many cases member States could be so described. Hence, it could be maintained that member States would then have a stricter duty. However, it is difficult to generalize and conclude that all the members of an organization always are in that position. The role that members can play clearly varies according to the situation. It is moreover likely that the position of members will not be identical in this respect. It is therefore preferable not to attempt to define a specific duty that members of the responsible organization would have.

59. In its 2006 report to the General Assembly, the Commission also raised the question whether international organizations have a duty to cooperate with States in bringing the breach of an obligation under peremptory norms to an end.[48] The question was raised in the context of tne current draft, although the answer may have implications also in the case when the breach is committed by a State and therefore the legal consequences are governed by article 41 on State responsibility.

60. While neither the text of article 41 on State responsibility nor the related commentary expressly envisage cooperation by international organizations, this is not ruled out. The commentary considers that States may resort to an international organization for their response:

> "Cooperation could be organized in the framework of a competent international organization, in particular the United Nations."[49]

61. An international organization may in fact have among its purposes that of bringing certain serious breaches of obligations under peremptory norms, for instance aggressions, to an end. Whether or not the current draft will contain a provision like article 59 on State responsibility, which says that "[t]hese articles are without prejudice to the Charter of the United Nations", there would not be any need to include a provision referring to the fact that the United Nations or other organizations have among their purposes that of combating serious breaches of obligations under peremptory norms. What may be controversial is whether international organizations have a duty like States to cooperate in order to bring those breaches to an end.

62. The great majority of responses to the question raised by the Commission were in favour of stating that international organizations have a duty like States to

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[46] A/C.6/61/SR.14, para. 54.

[47] See the intervention by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/61/SR.13), para. 33. The delegation of Switzerland made a different point, when it noted that "for the members of an organization, there might be an obligation to cooperate that extended beyond the prevention of violations of *jus cogens* only" (A/C.6/61/SR.15), para. 8.

[48] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), chap. III, para. 28 (b).

[49] Paragraph 2 of the commentary to article 41. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), at p. 287.

cooperate to bring the serious breach committed by another organization to an end.[50] As was said by the Russian Federation:

> "It should also be evident that States and international organizations were bound to cooperate to terminate unlawful acts by an international organization, just as if it were a State."[51]

63. When cooperating to bring a serious breach to an end, international organizations would not be required to act inconsistently with their constitutive instruments or other pertinent rules. The Organization for the Prohibition of Chemical Weapons called attention to this issue:

> "[...] it can be argued that the extent of the obligation of any international organization to bring a breach of *jus cogens* to an end, unlike that of States, should also be limited by the same, i.e. it must always act within its mandate and in accordance with its rules."[52]

However, an exception has to be made for the case that the pertinent rules of the organization are in conflict with a peremptory norm.

64. While the focus of the discussion on the legal consequences of a serious breach of an obligation under a peremptory norm is on cooperation to bring the breach to an end, article 41 on State responsibility also refers to other consequences, such as the prohibition to "recognize as lawful a situation created by a serious breach". Some instances of practice relating to serious breaches by States concern the duty for international organizations not to recognize as lawful the situation created by the breach. For instance, with regard to the annexation of Kuwait by Iraq, Security Council resolution 662 (1990) called upon "all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation".[53] Another example is provided by the declaration that Member States of the European Community made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". This text included the following sentence:

> "The Community and its Member States will not recognize entities which are the result of aggression."[54]

65. The following draft articles are here proposed:

Draft article 43
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by an international organization of an obligation arising under a peremptory norm of general international law.

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[50] Reference is to be made to the interventions listed in note 44. However, Romania did not specifically refer to a duty to cooperate for international organizations and Jordan only mentioned States.

[51] A/C.6/61/SR.18, para. 68.

[52] See A/CN.4/582, sect. II, G, 2.

[53] Security Council resolution 662 (1990) of 9 August 1990, para. 2.

[54] *International Legal Materials*, vol. 31 (1992), p. 1486, at p. 1487.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible international organization to fulfil the obligation.

Draft article 44
Particular consequences of a serious breach of an obligation under this chapter

1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 43.

2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of article 43, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.